Public Utilities

FORTNIGHTLY

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July 20, 1939

PUBLIC UTILITIES REPORTS, INC.
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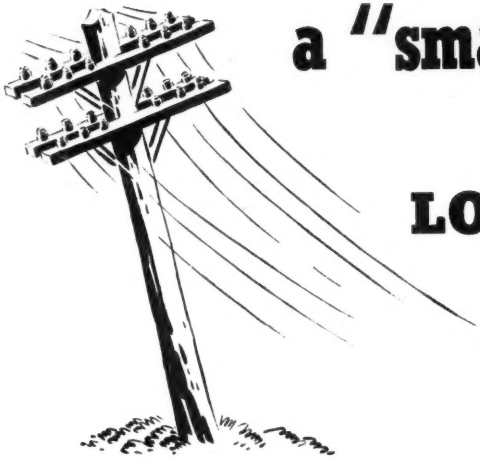
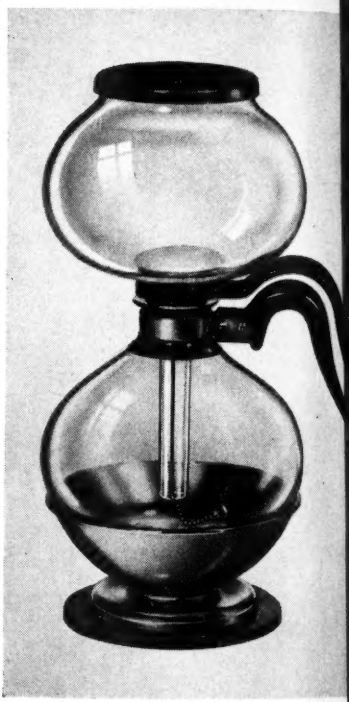


a "small appliance" with B... LOAD-BUILDIN... POWE...



SILEX is an important step towards the all-electric home, goal of every domestic load-building promotion. Every Silex Glass Coffee Maker equipped with Anyheet Control will add 97 KWH to your domestic load. Multiply this by the number of possible installations on your lines, and you will see that Silex load-building power is worth talking about, worth promoting!

Thousands of your customers want Silex, nationally famous for making richer, clearer, coffee! Over 5,000,000,000 advertising impressions have promoted this finest of coffee makers in the last 5 years alone! Make it easy for every home on your lines to use Silex, and you'll build load, easily!

Don't Overlook Silex Commercial Models

There's load-building power in large Silex Glass Coffee Makers for restaurants, hotels, lunch counters, institutions. 2 to 8 unit models from $21.45.

Promote Silex Glass Coffee Maker equipped with Anyheet Control

Delray Electric table model with quick cooling stove, upper bowl handle, filtration through cloth held under spring tension, and equipped with Anyheet Control, the only device for giving a choice of coffee temperatures, keeps coffee at drinking temperature indefinitely. Retails from $5.95

Genuine SILEX GLASS COFFEE MAKER

THE SILEX COMPANY, Dept. P-7, HARTFORD, CONN.

Creators of the Glass Coffee Maker Industry

Brewing Completed without Removing Glass from Stove

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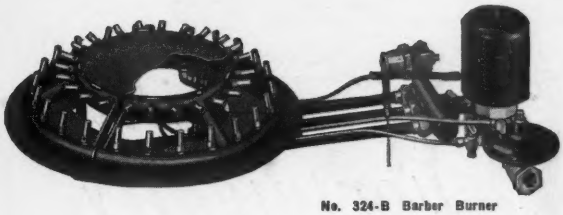

No. 324-B Barber Burner

BARBER Conversion BURNERS
The Economical Way To Gas Heat

Equipment for automatic gas heat can, and should, be sold not only on the basis of health and economy—but as a method of freeing American housewives from antique drudgery and needless dirt and discomfort. Show your feminine customers how easily they can heat with gas and use the furnace now in the house. Barber Conversion Burners will increase your sales to satisfied customers.

There is a Barber assembly designed to fit properly every furnace or boiler, of any make, size or shape. Economical to install and operate. Reliable in performance, cuts down service calls. Barber offers active, resultful merchandising cooperation to Gas Companies and heating equipment dealers.

- "Tailor-made" to *suit* and *fit* the grate dimensions of round or oblong furnaces or boilers. Round and oblong burners adjustable to grate sizes.
- Insures a perfectly controlled, properly applied "scrubbing" flame action on side walls of fire box, at the proper level, with 1900° Fahrenheit flame temperature. No fire brick or refractory elements needed.
- Furnished with Baltimore Safety Pilot Control—positive and accurate. Listed in the A. G. A. Directory of Approved Appliances.

Keep a Barber Burner on display. Consumer literature and practical sales assistance gladly furnished on request. Write for Complete Catalog.

E BARBER GAS BURNER CO., 3704 Superior Avenue, Cleveland, Ohio

• BARBER *Automatic* JET GAS BURNERS •

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Associate Editors—ELLSWORTH NICHOLS, FRANCIS X. WELCH, NEIL H. DUFFY
Financial Editor—OWEN ELY

Public Utilities Fortnightly

VOLUME XXIV *July 20, 1939* NUMBER 2

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¶ *This magazine is an open forum for the free expression of opinion concerning public utility regulation and allied topics. It is supported by subscription and advertising revenue; it is not the mouthpiece of any group or faction; it is not under the editorial supervision of, nor does it bear the endorsement of, any organization or association. The editors do not assume responsibility for the opinions expressed by its contributors.*

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in Power and in Gas Savings!

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GMC TRUCKS TRAILERS - DIESELS

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Pages with the Editors

THERE are some folks who have gotten themselves into such a state that no matter what happens they are ready to blame the utility company. A rather amusing instance recently occurred in a certain large city where a utility company was busy refunding a great deal of money to its customers. This was the result of the termination of some rate litigation in which the impounded excess rate collections had reached a pretty sizeable proportion.

THE refund was, of course, well publicized (such events usually are); and a good section of the local citizenry was really looking forward to this financial windfall from the utility coffers. Housewives had already spent it, in their mind's eye at least, for new hats or other raiment; while many a car owner anticipated doing something, at last, about his bald-headed tires.

IMAGINE the chagrin of several hundred of these expectant folks, however, when banks, attorneys, and assorted creditors descended upon the utility company and, with one fell swoop, blocked the golden flow with a shower of attachment writs. The financial delinquencies which caused these writs ranged from unpaid judgments on damage suits to claims for back alimony. Probably a good many of the "victims" took their medicine with the knowledge if not the consolation that nothing could be done about it.

National Safety Council

EARL J. REEDER

New lamps for old—a crying need of the city streets.

(SEE PAGE 79)

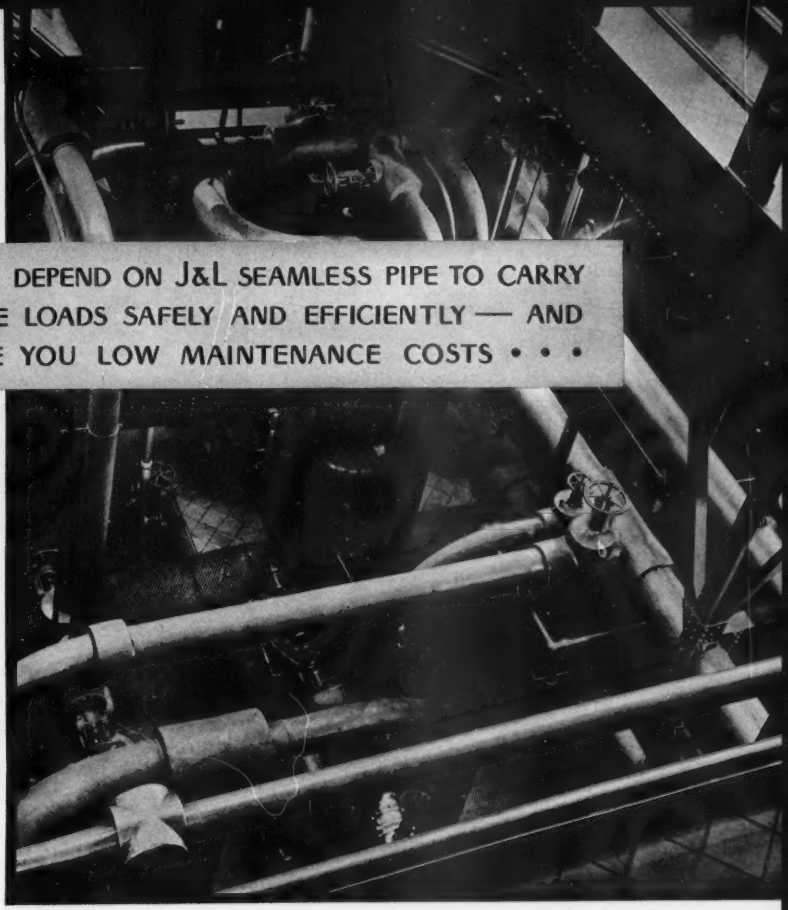
FERGUS J. MCDIARMID

An insurance man looks at the sinking fund for utility bonds.

(SEE PAGE 67)

BUT some didn't. Collusive conspiracy between creditors and the utility was suspected. The most laughable reaction, however, came from a gentleman who had neglected to pay his income taxes for some time. The U. S. Collector of Internal Revenue filed a "distraint" order against his refund check along with about a hundred other tax dodgers. The gentleman was very bitter. "It's plain as day," he raged, "the utility company and the Federal government are a-workin' in cahoots!"

BE that as it may, there does not seem to be any noticeable improvement in the sympathetic understanding between the Federal administration and the electric power industry in Washington these days. At this writing, at least, the TVA-Tennessee Electric Power Company purchase is deadlocked in a short-



YOU CAN DEPEND ON J&L SEAMLESS PIPE TO CARRY PRESSURE LOADS SAFELY AND EFFICIENTLY — AND TO GIVE YOU LOW MAINTENANCE COSTS • • •

y specifying J & L Seamless for power piping, engineers and maintenance men throughout the country hav dorsed it for strength, safety and dependability. Every length of J & L Seamless is rolled from a solid bille "controlled quality" steel. There are no welds, therefore no chance of failure at or near a weld.

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ONES & LAUGHLIN STEEL CORPORATION

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tempered and heat-weary Congress. Meanwhile, the administration is trying desperately to put through another colossal loan program. And, government disavowals about competition with private business to the contrary, some utility men are picking the new plan over suspiciously with the conviction that it will somehow turn out to be another "Trojan horse" which would, if enacted, disgorge a fresh batch of municipal plants, hydro-flood-navigation projects, Passamaquoddys, and what not.

ONE angle of domestic regulation of utility financing which has attracted more speculation than action is the subject of debt retirement. Back in November, 1934, at a press conference in Warm Springs, Ga., President Roosevelt said:

> "IF you were to analyze the financing of most of the private power companies, you will find that in the majority of cases they have been following the pernicious rule of the railroads. They get out a 20- or 30-year bond issue and they don't start a sinking fund. When the bonds mature they don't pay them off. For example, in the paper yesterday morning, there is one company that is seeking to refund an issue of bonds which were issued twenty years ago. That is what has hurt the railroads. The railroads never paid off a single bond which had matured. They never set up a sinking fund. . . ."

OF course, there has been some substantial adoption of the sinking fund practice in utility bond issues, especially during recent years. The question arises, however, whether the reduction of funded debt invariably puts a utility in sound financial condition. There is the counter possibility that it might, if carried to the point of virtual debt extinguishment, make the utility a more attractive target for rate agitation by politicians who might otherwise fear to precipitate bond defaults with resulting receivership. What does the informed utility security analyst think about this?

SUCH is the subject of the leading article in this issue by FERGUS J. MCDIARMID, an investment specialist with the Lincoln National Life Insurance Company of Fort Wayne, Ind., whose previous articles on matters of utility finance have invariably attracted favorable attention from FORTNIGHTLY readers. MR. MCDIARMID graduated from the University of Toronto in 1928, and became associated with his present employer three days after his graduation. He has been very active in actuarial affairs and is a Fellow of the Actuarial Society of America and a Fellow of the American Institute of Actuaries.

EARL J. REEDER, whose article on the need for better street lighting appears in this issue (beginning on page 79), is the chief traffic engineer of the National Safety Council and has been connected with the Chicago headquarters of that organization for fifteen years. He graduated in civil engineering from Michigan State College in 1915 and immediately entered upon the field of industrial accident prevention work. He became safety director of the Chevrolet Motor Company at Flint, Mich. He came to the National Safety Council in 1923. He has consulted with more than 40 cities concerning traffic safety problems, and has been active in the development and promotion of traffic engineering procedure.

WILLIAM M. WHERRY

Constitutional immunity—Democratic version of "The King can do no wrong."

(SEE PAGE 84)

THE second instalment of his article on constitutionality of Federal competition with private industry concludes in this issue (page 84) an analysis of that subject by WILLIAM M. WHERRY. Born in New York in 1878, MR. WHERRY received his B. S. from the University of Michigan ('98) and pursued his law studies at Cincinnati Law School and Columbia University. Following his admission to the bar he has been continuously engaged in law practice in New York city. MR. WHERRY soon became a specialist in utility regulation and has done considerable teaching and writing on that subject.

THE next number of this magazine will be out August 3rd.

The Editors

This desk was designed for the Ohio Fuel Gas Company, Columbus, Ohio. It is earning a very satisfactory return on the investment it represents.

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THE REMINGTON RAND UNIT BOOKKEEPING DESK

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In This Issue

In Feature Articles

In Financial News

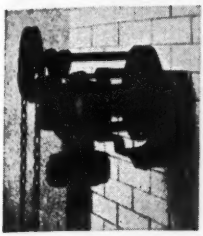
In What Others Think

In The March of Events

In The Latest Utility Rulings

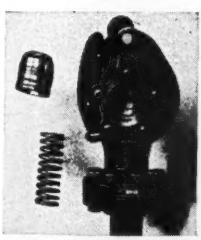
PREPRINTS FROM PUBLIC UTILITIES REPORTS

Various regulatory rulings by courts and commissions reported in full text, pages 257-320, from 28 P.U.R.(N.S.)



VULCAN VALVE HEAD, LG-1

e Vulcan Automatic Valve Operat- Head is an advanced development the high and ever increasing higher ssure and temperature conditions countered in modern steam plants. mplicity is the keynote in design and nstruction. A piston valve steam tuated thru a pilot valve provides sitive operation—makes Vulcan tomatic Heads the greatest step ead in Soot Blower Design in the st 15 years.



VULCAN VALVE ASSEMBLY

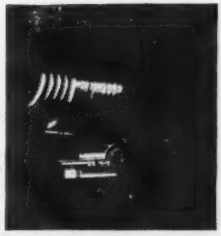
lcan Valves of completely corrosion sistant materials and stainless steels designed for immediate accessi- ity; they are so successfully de ned that of thousands in use no ve of this type has ever failed in vice. Vulcan construction permits aptation to every increase in pres- e for modern boilers—no valve stems break—no opening or closing against am pressure—no regrinding of ves is ever required—valve packing eliminated. All Vulcan Heads are ipped with Vulcan pioneer Under n Supports which have eliminated rpage of elements.

Lowest Cost? . . . NO! Highest Quality? emphatically YES!

VULCAN
SOOT BLOWERS

—are built with but one object—to provide industry with the highest quality equipment of this type it is possible to build. Every steam plant offers new problems in soot removal—Vulcan Engineers have successfully solved thousands of such problems. Vulcan installations are soundly designed, individually designed to do their work efficiently and economically—*to cut fuel costs and provide real savings in steam production.*

From the desks of design and layout engineers to drafting room to factory craftsmen and to field service, Vulcan personnel takes pride in providing a personalized installation, built to exacting standards for long service and economical operation—backed by a record of lowest maintenance. ***Ask the Vulcan Engineer representative why Vulcan must build to highest standards only.***



VULCAN VALVE DETAIL

Vulcan Soot Blower Corporation • Dubois, Pa.

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Remarkable Remarks

"There never was in the world two opinions alike."
—MONTAIGNE

BURTON K. WHEELER
U. S. Senator from Montana.

". . . if you are going to regulate one form of transportation, regulate all of them."

PERCY S. YOUNG
Chairman of the Executive Committee, Public Service Corporation of New Jersey.

"The soundness of the gas industry from the long-term point of view is unquestioned."

EDWARD F. BARRETT
President, Long Island Lighting Company.

"Utilities have grave and important problems, but we know it and have the men and management to solve them."

ALVA JOHNSTON
Special feature writer.

"Television excels all other subjects in the arena it furnishes for the battle between optimists and pessimists."

HAROLD L. ICKES
Secretary of the Interior.

"Democracy is not a way of voting; it is a way of life. It is not a phrase for orators to juggle with; but an ideal to fulfill."

JAMES B. BLACK
President, Pacific Gas and Electric Company.

"Natural gas has not only filled the old markets but it has moved into new uses that were not foreseen in the early days of the industry."

HERMAN E. HOERL
President, Wisconsin State Telephone Association.

"The REA seems willing to spend millions for litigation, but not one cent for the companies [telephone] hurt by their construction projects."

A. J. WILTSE
Michigan printing firm operator.

"I don't believe that collective bargaining is the be-all and end-all in labor relations. I think individual bargaining is just as important."

CONRAD N. LAUER
President, American Gas Association; President, Philadelphia Gas Works Company.

"In the field of air-conditioning the gas industry has another use for its product, which, as in refrigeration, has romance and definitely reflects modernity."

ERNIE PYLE
Traveling columnist.

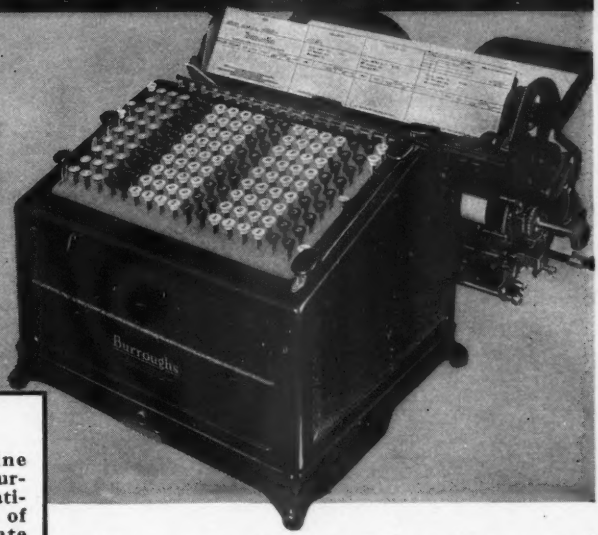
"Do you personally know, or even know anybody who knows, somebody who has ever been solicited, approached, questioned, or chronicled by a Gallup poll-taker? I don't."

Burroughs

PUBLIC UTILITY BILLING MACHINE

Speeds up and cuts the cost of

CUSTOMER BILLING



1

Burroughs Billing Machine writes bill and office record, furnishes a journal, and automatically accumulates totals of revenue classifications, rate blocks, etc.

2

Automatically warns operator if a mistake is made in computing consumption in the meter book or in entering reading and consumption figures on the keyboard. This eliminates the need for checking consumption figures before writing bills.

3

The Short-Cut Keyboard enables operator to enter two sets of figures (such as gross and net amount) on the keyboard, and depress operating bar—*all at the same time.*

4

Figures are automatically repeated *by the machine* on both stubs and ledger.

5

Bills completed are automatically ejected and stacked in correct billing order.

Whatever plan is used—Bill and Ledger, Stub, or Register Sheet—this new Burroughs will do the job with greater speed, simplicity and ease of operation. And bills and records will be neater, more accurate, more complete.

Many municipal utilities also use this machine to write delinquent bills or to create a collection stub at the time of billing, thus speeding up collections and reducing the number of delinquent accounts.

Investigate. Ask your local Burroughs office to demonstrate the many automatic features that make this new Burroughs outstanding for municipal utility billing. Or mail the coupon for complete information.

MAIL THIS COUPON TODAY!

Burroughs Adding Machine Company
6242 Second Boulevard, Detroit, Michigan
I would like complete information about the new Burroughs Public Utility Billing Machine.

Name_____

Address_____

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MILLARD E. TYDINGS
U. S. Senator from Maryland.

"It is bad policy to run a government on hunches. It is bad to run it on money that five future generations will have to raise in order to make the nation solvent."

PAUL RYAN
Chief Statistician, American Gas Association.

"One of the most phenomenal industrial developments in the United States during the past few years has been the rapid growth . . . of the natural gas industry."

JOSIAH W. BAILEY
U. S. Senator from North Carolina.

"Destroy all the water transport in the Mississippi valley, on the Atlantic coast, and on the Pacific coast, and it wouldn't serve the purpose contemplated for the railroads."

FLOYD W. PARSONS
Editorial Director, Gas Age.

"Private enterprise is now contributing only about one-sixteenth of the total inflow of new funds into business, while government enterprise is contributing about fifteen-sixteenths."

J. STANLEY MCLEAN
Representative, Canadian Chamber of Commerce.

"To the liberal-minded business man the depression has brought what may be called a new philosophy of his duty on the one hand to his shareholders, and on the other to his employees."

WALTER C. BECKJORD
First Vice President, American Gas Association; Vice President and General Manager, Columbia Gas & Electric Corporation.

"The number of customers using gas for house heating increased without exception during every year of the depression and today more than 2,225,000 house-heating customers are on gas lines."

ROBERT A. TAFT
U. S. Senator from Ohio.

". . . if no man can look forward to anything except an old-age pension, we are never going to resume the progress which built up America to be the greatest and the most prosperous nation in the world."

HARRY L. HOPKINS
Secretary, U. S. Department of Commerce.

"Use of government funds—belonging to all the people—to improve the lot of the worker and the farmer while our economy moves upward into balance, is but the modern method of protecting our private economy."

THOMAS N. MCCARTER
Chairman of the Board, Public Service Corporation of New Jersey.

". . . . we have done remarkably well despite the fact that there has been levelled against this [electric utility] industry a very serious governmental political attack which seems to have been quite unwarranted in these troublesome days. . . ."

THOMAS M. GIRDLER
Chairman, Republic Steel Corporation.

"The voters can make economy politically popular, and wastefulness political suicide. But economy alone will not save the day. Removal of the obstacles to normal business recovery is equally essential in order that the flow of private capital may make up for such reduced government spending as may be possible."

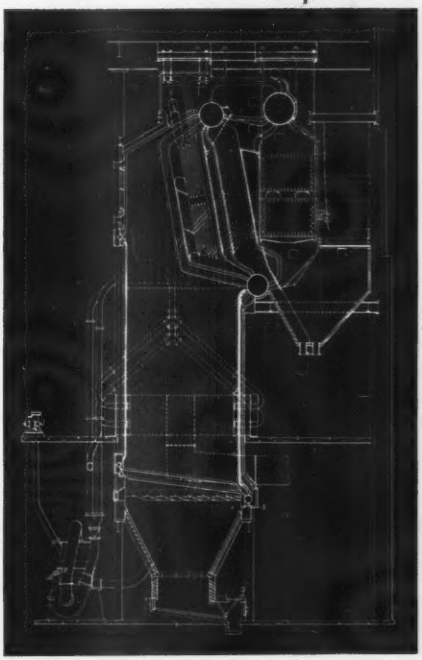
No. 17 of a Series

MODERN STEAM GENERATING UNITS

OHIO EDISON COMPANY

MAD RIVER STATION, SPRINGFIELD, OHIO

Capacity—225,000 lb. per hr.
Design Pressure—900 lb.
Total Steam Temperature—900 F



The sectional elevation at the right shows a C-E Unit which has been in operation in the Mad River Plant of the Ohio Edison Company since December 1938. Under normal operating conditions this unit supplies all steam used at this station.

C-E equipment includes a Type VS Boiler, Water-Cooled Furnace, Bowl Mills, Tangential Burners, Elesco Superheater, Elesco Economizer and Ljungstrom Air Heater.

The design and construction of the plant extension, of which this equipment is a part, was under the supervision of The Commonwealth & Southern Corporation engineering staff.

• • •

Many of the most notable steam generating units of the present day have been designed by Combustion Engineering. They include seven of the nine units in the world which are capable of producing 1,000,000 lb. of steam per hr.; also the boilers most recently installed in the world's largest utility, industrial and central heating plants.

C-E Products include all types of

BOILERS • FURNACES • PULVERIZED FUEL EQUIPMENT • STOKERS
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A-436

C-E **COMBUSTION ENGINEERING**

COMBUSTION ENGINEERING COMPANY, INC., 200 MADISON AVENUE, NEW YORK

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ONE WAY...

without a → concrete envelope

OR ANOTHER

← "concreted-in"

BOTH CONDUITS cut Electrical Distribution Costs!

SELECTING the *right* electrical conduit to meet specific problems is an important factor in providing for permanent distribution savings.

Consider, therefore, the contributions made toward this end by both J-M Transite Conduit and Transite Korduct . . .

Both are asbestos-cement in composition...hence permanently resistant to corrosion, incombustible and weatherproof. In common, these materials possess an inherent durability that promises years of virtual freedom from maintenance.

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As for Transite Korduct . . . it's the logical choice on all multiple-duct transmission systems—or wherever the service calls for "concreting-in." For here, its light weight and long lengths reduce both material and handling costs.

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Johns-Manville

TRANSITE CONDUIT

for use underground without concrete envelope and for exposed locations

TRANSITE KORDUCT

for installation in concrete

JM

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ONLY ROYAL HAS IT

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NO FUSS NO FRET

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For Royal's New No. 1 is *new*—first in new ideas—*years ahead!*

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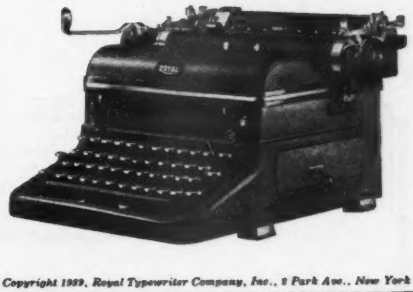
But MAGIC Margin isn't all! There are also Royal's New Time-Saver Top, Finger-Tip Controls, Improved Shift Freedom and many other Features of the Future. All make typing easier, faster—help the typist do a good job better!



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Phone your local Royal Representative. Give this New Royal THE DESK TEST. In your own office . . . Compare the Work!

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ROYAL more than ever WORLD'S No. 1 TYPEWRITER

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ROBERT A. BURROWS'

NEW 1939 UTILITY CHART

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WATER • COMMUNICATIONS • INVESTMENT COMPANIES
ETC.

● *Showing at a glance* ●

"INTER-RELATION AND CAPITALIZATION OF THE PRINCIPAL PUBLIC UTILITY HOLDING, OPERATING AND INVESTMENT COMPANIES AS OF JUNE 1, 1939"

ALSO SERVICE AREA MAPS OF THE PRINCIPAL PUBLIC UTILITY SYSTEMS IN THE UNITED STATES
(Chart Size—34″ x 28″)

An indispensable reference for **● Public Utility Executives ● Utility Supply Companies ● Banks ● Brokers ● Investment Counselors ● Trust and Insurance Companies ● Public Service Commissions ● Investors ● Or any one interested in any phase of the Public Utility Industry.**

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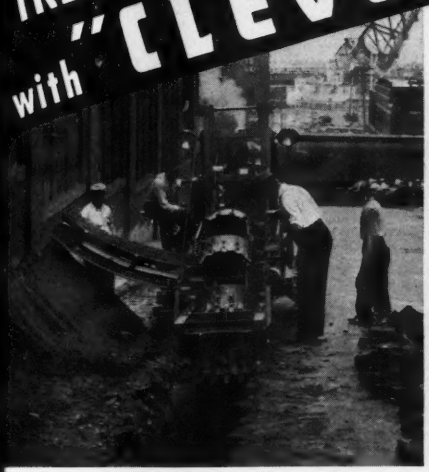

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ime-tested, time-proven, compact, fast, flexible, streamlined for light weight, easy o move around the job, easy to move around the country, yet rugged and abundntly powered, "CLEVELANDS" have the built-in qualities that enable you to get ipe line in the ground quickly, with least "times-out" and at lowest cost. "CLEVEANDS" are sold on a guaranteed satisfaction basis. Get the details—write today.

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YOU OWE YOUR MEN
THE BEST THERE IS

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NO GEARS TO WEAR OR RATTLE

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Roof mounted searchlight for repair, inspection and emergency cars. Range of 360° at any height.

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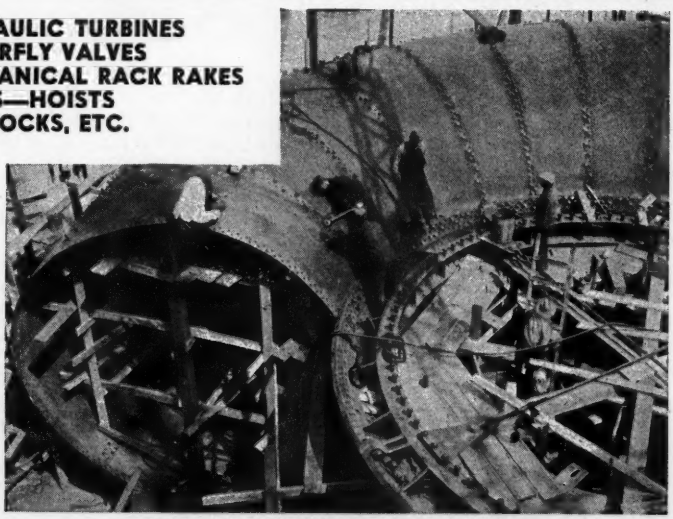

Bolting the Spiral Casing before Riveting

NEWPORT NEWS SHIPBUILDING AND DRY DOCK COMPANY
Hydraulic Turbine Division
NEWPORT NEWS, VA.

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PAT'D.
MAY 14th
1878

The "CALCULATING MACHINE" won and holds APPROVAL because its principle was correct

It's a far cry from this primitive model to today's vastly improved complex machines. But the basic principle of substituting mechanism for human errors was and still is correct, gives better results, hence will always hold the approval of the business world. So the principle of the nutating disc as used in Trident Water Meters, won and still holds the continual approval of the water works field. Today Trident Meters are known the world over not only for unparalleled sensitivity, but also for sustained accuracy, low maintenance costs. Neptune modern precision-shop-equipment and methods of manufacture have pioneered in a new era of water meter construction.

● *Neptune Meter Company, 50 West 50th Street (Rockefeller Center), New York City. Branch Offices in Principal Cities. Neptune Meters, Ltd., 345 Sorauren Avenue, Toronto, Canada.*

SINCE 1892

Trident WATER METERS

HAVE HELD THE CONTINUAL

APPROVAL OF THE WATER WORKS FIELD

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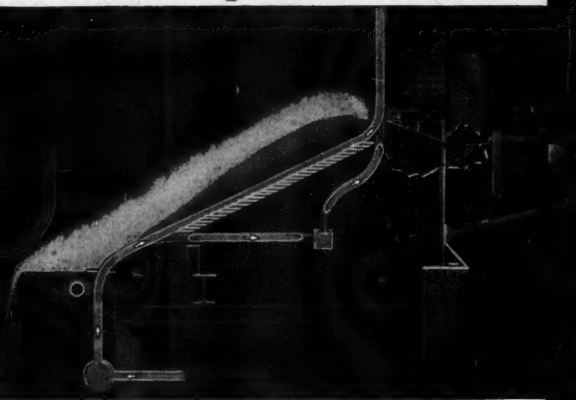
16.73¢ FOR FUEL
per thousand pounds of steam



Calculated efficiency—a basic consideration in the selection of steam generating equipment—cannot safely be arrived at only in terms of "thermal" efficiency developed by test. What the operator must have is a reliable expectation of *dollar* efficiency, based on actual performance of the equipment over an extended period. Ask an A-E-CO representative to show you data on the dollar efficiency of Taylor Stokers—efficiency such as shown by the installation at Sloane-Blabon Corporation, whose fuel cost ratio, including cost of storage and handling to stoker hoppers, is expressed above. American Engineering Company, Philadelphia, Pa.

GET THE FACTS ABOUT Reliability Capacity • Maintenance • Flexibility ★Efficiency • Operation • Adaptability • Fuel Flexibility • Refuse Disposal Stack Discharge • Space Requirements • Obsolescence.

THE A-E-CO TAYLOR STOKER

AMERICAN ENGINEERING COMPANY

Taylor Stokers, Water Cooled Furnaces, Ash Hoppers, Lo-Hed Hoists, Marine Deck Auxiliaries, Hele-Shaw Fluid Power.

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his Load Builder Lets You Sell A New Market

GRINNELL THERMOLIER

ELECTRIC TYPE . . . . . *for*

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VALVE HOUSES
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PARKING LOTS
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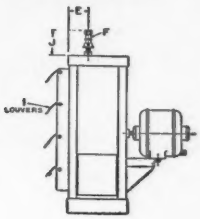

This Grinnell appliance offers heating satisfac-on to a market you may have been missing—and worthwhile load to you. The locations listed bove, and similar ones you know of in the terri-ry you serve, are ideal spots to install the hermolier Electric Type.

It provides simple, easy installation, and its daptability is such that it meets a great variety unusual heating requirements. The specially ilt electric fan, combined with a dependable ng life heating element which is automatically rotected, assures a full measure of even heat herever this appliance is installed. Six sizes and apacities. Write today for full details on hermolier Electric Type for your Sales Depart-ent, and consider this dependable unit heater r your own power plants and substations. rinnell Company, Inc., Executive Offices, rovidence, R. I. Branch offices in principal cities.

THE HEATING ELEMENTS

G-E Strip Heaters, specially built, with protective coating good for 1000° F., mounted to allow for expansion, protected against over-heating by thermal over-load cut-off which disconnects heating element if fan stops. Cut-off easily reset by a button control.

GRINNELL THERMOLIER

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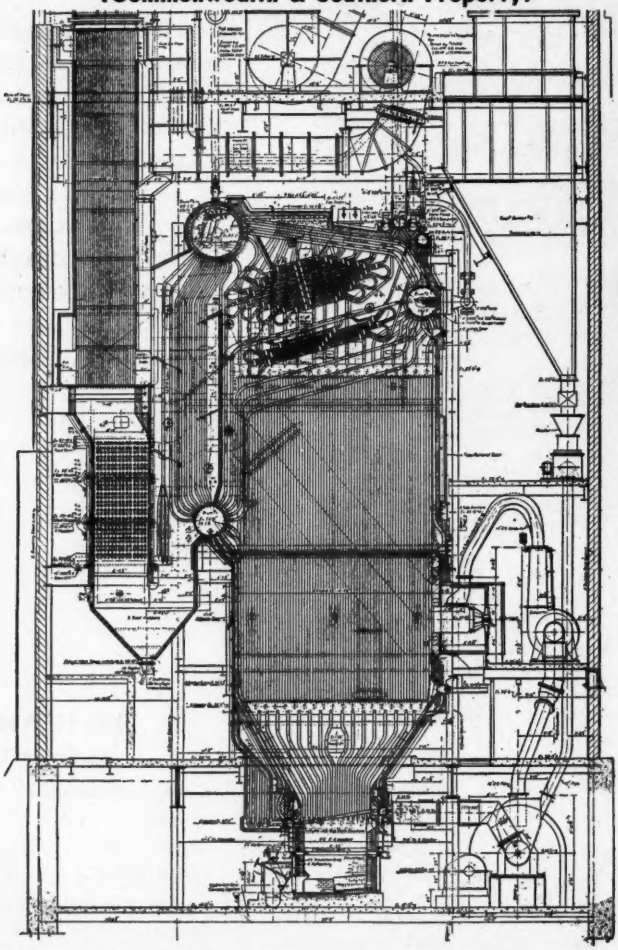
RILEY STEAM GENERATING UNIT

Installed in the plant of

Central Illinois Light Company, Peoria, Ill.

(Commonwealth & Southern Property)



300,000 lbs. steam per hour, 900 lbs. pressure, 875° F. Steam Temperature

RILEY STOKER CORPORATION

WORCESTER, MASS.

BOSTON NEW YORK PHILADELPHIA PITTSBURGH BUFFALO CLEVELAND DETROIT TACOMA
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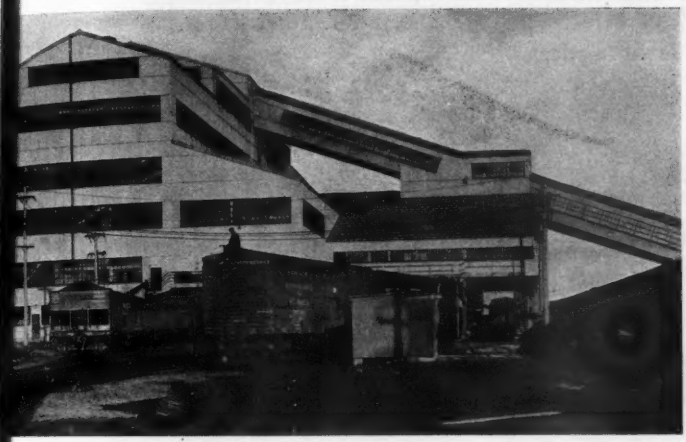
INSULATED WIRE AND CABLE



COAL MINES USE IT! . . .

Where safety of human life and limb as well as uninterrupted production depend on a constant flow of current for power and light, you'll find Crescent Wire and Cable among the chosen few.

IMPERIAL Cable, shown at the right, is an all-rubber portable cable which combines every feature of toughness, durability and safety required in the severe duty encountered in and around mines. Also, you can count on it to fill, with entire satisfaction, the most difficult portable cable installations.

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INSULATED WIRE & CABLE CO. INC
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CONTROL CABLE	RUBBER POWER CABLE
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All types of Building Wire and all kinds of Special Cables to meet A.S.T.M., A.R.A., I.P.C.E.A., N.E.M.A., and all Railroad, Government and Utility Companies' Specifications.

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HOW CAN DODGE TRUCKS BE PRICED WITH THE LOWEST?

[WHEN NO OTHER TRUCK HAS ALL THESE FEATURES OF DEPENDABILITY, ECONOMY AND LONG LIFE?]

Luxurious Comfort for the Driver
Dodge Truck seats provide real "easy-chair" comfort. Wider windshields and windows give maximum vision. Ventilation through *both* cowl and windshield is another Dodge driver-comfort feature!

THIS year your money buys more in Dodge trucks because they're built in a giant new truck plant, especially engineered for better truck manufacture. It's the largest, most modern single-unit exclusive truck plant in the world. And it's equipped to give you latest new developments—like completely Bonderized (rust-proofed) cabs, bodies and fenders—which you can't get in other trucks at any price.

Dodge gives you new dependability in vital units, too! The super-tough Amola Steel in Dodge axle shafts and springs, for example, was developed expressly to meet new and more severe requirements. No other steel is like it—no ordinary alloy steel can match Amola's amazing combination of hardness and toughness—it's your assurance of dependability and important savings on repairs.

And Dodge powers each truck model with a truck engine expressly designed to match the load capacity of the unit—to cut your gas and oil costs to the minimum that is possible with good performance.

Go to your Dodge dealer, and see for yourself how many extra money-saving advantages like these you get in 1939 Dodge trucks, at prices that are right down with the lowest.

DEPENDABLE DODGE TRUCKS

Complete Line—½-ton to 3-ton—See Your Dodge Dealer for Easy Budget Terms

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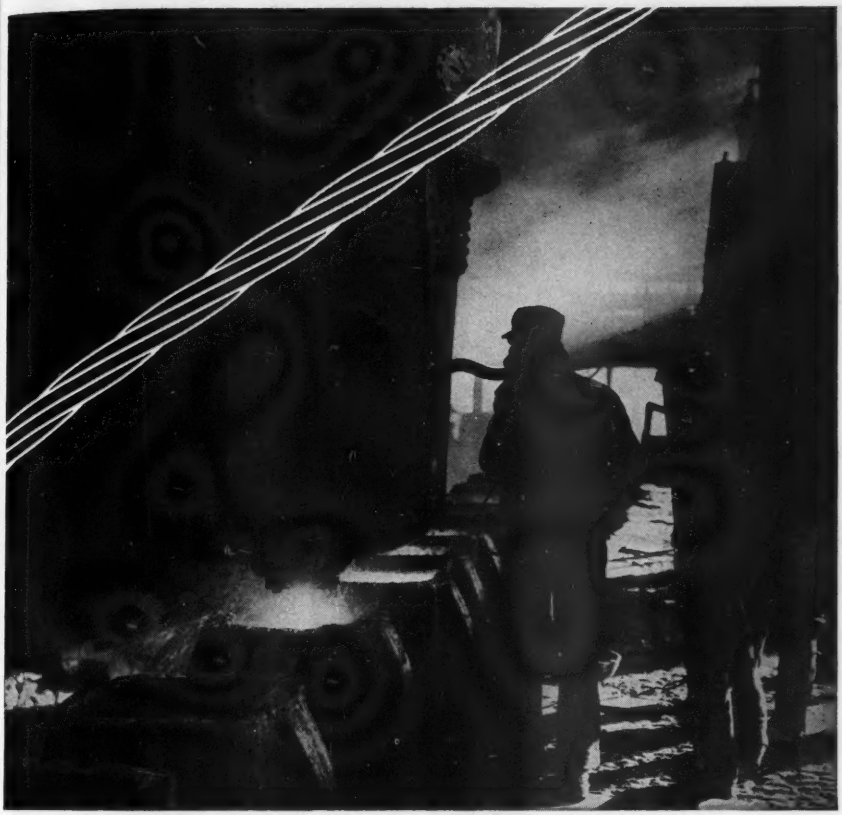

A set-up for meeting special requirements in strand

WHEN special characteristics are required in strand, the place to begin is at the open-hearth furnace. The complete integration of all manufacturing operations under Bethlehem's system of control, beginning with steel making and following through all subsequent phases, is an important factor in making strand to meet special conditions.

BETHLEHEM STEEL COMPANY

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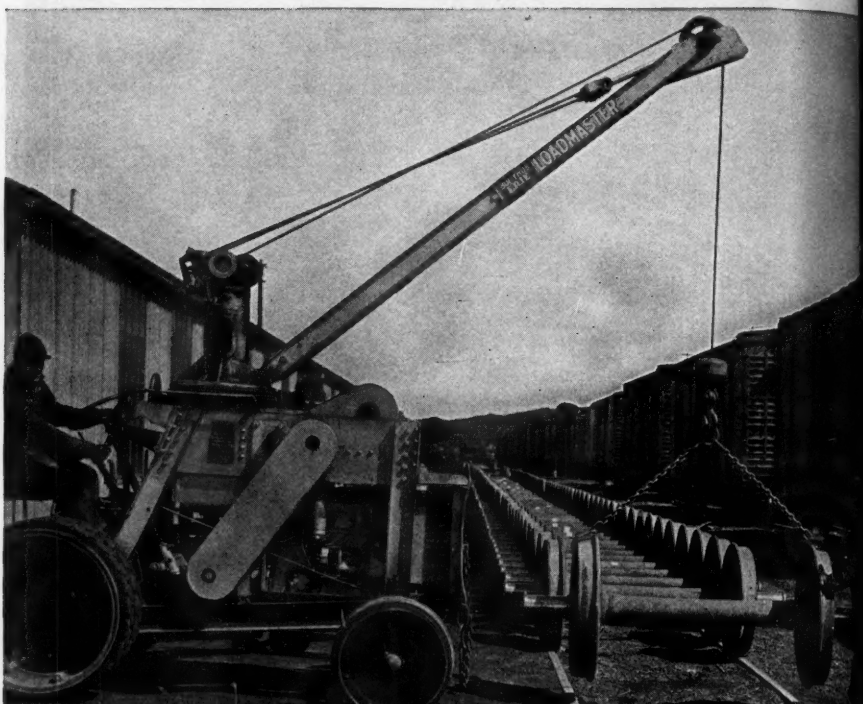
CUTTING CORNERS ON COST



An International Industrial wheel-type tractor with crane built around it—an example of how Internationals are ... adapted to a wide variety of work.

ECONOMY of International Industrial Tractors is proved in the rapidly growing demand for them by men who have had experience with a variety of tractor power. The example shown here is only one of the diversified applications of these tractors. The call for International's economy, efficiency, and dependability increases every day.

International Tractors are available in wheel and crawler types. There are five wheel tractors (gasoline and Diesel), and six TracTrac... (gasoline and Diesel), including the new 70 h... TD-18 Diesel TracTracTor. In this wide varie... you will find the tractor to fit your jobs. See t... nearby International industrial power dealer ... Company-owned branch for detailed informati...

INTERNATIONAL HARVESTER COMPANY
(Incorporated)
180 North Michigan Avenue Chicago, Ill...

INTERNATIONAL HARVESTER

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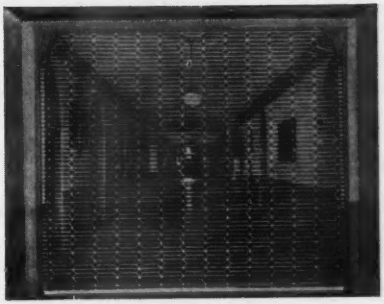
He Can't Get in Here . . .

BUT LIGHT AND AIR CAN!

KINNEAR
ROLLING GRILLES



Here's the way to safeguard your property. The KINNEAR ROLLING GRILLE provides positive protection against intrusion without obstructing light, air, or vision. Its rugged network of solid steel bars and heavy steel links, secured in steel jamb-guides, make it remarkably strong. Coiling easily and compactly above the opening, it remains completely out of the way when not in use, yet is always ready to be instantly lowered and locked in place. Its efficient principle of operation saves maximum floor and wall space, and assures lasting, carefree service. And to make it more widely applicable, the Kinnear Rolling Grille is built to fit individual requirements, in doorways, corridors, windows and many other types of openings . . . and is easy and economical to install.

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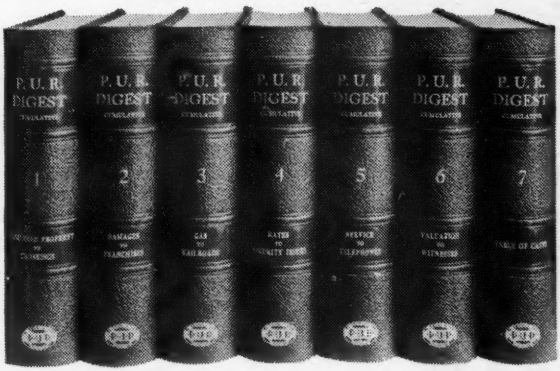
P. U. R. DIGEST

CUMULATIVE



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The Only Complete Digest of Public Service Law and Regulation

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A WORK OF PRIMARY AUTHORITY CONTAINING THE DECISIONS AND RULINGS OF THE

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A GREAT SERVICE

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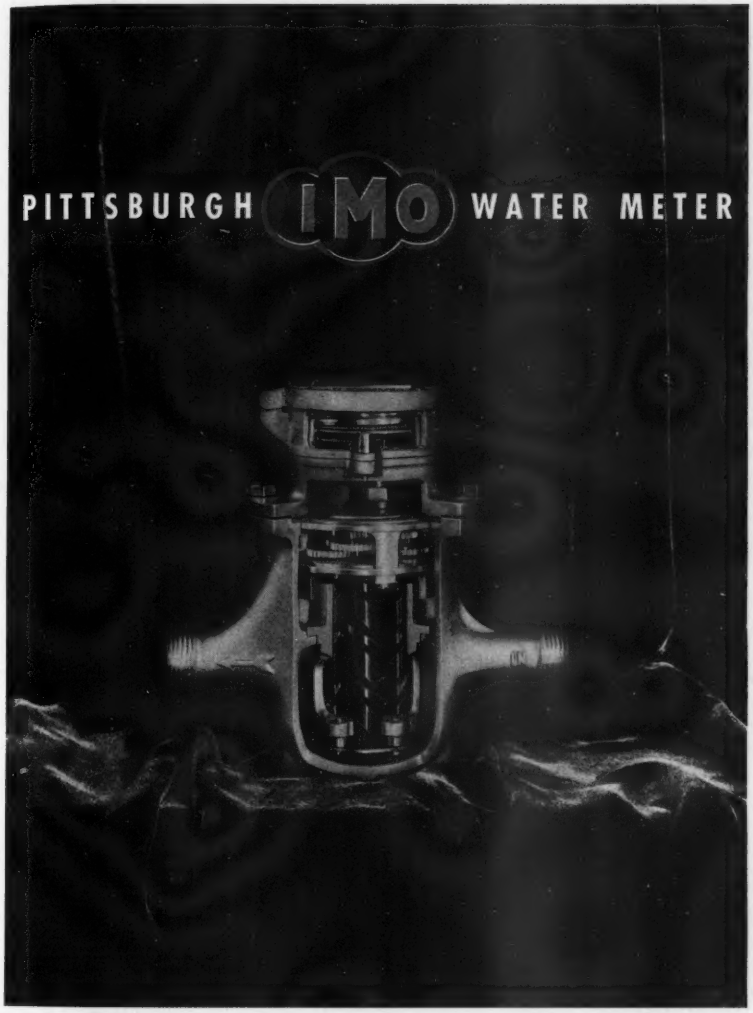

MADE WITH ALL THE PRECISION AND ACCURACY OF A FINE WATCH

PITTSBURGH EQUITABLE METER COMPANY
MERCO NORDSTROM VALVE CO.
NEW YORK · BUFFALO · PHILADELPHIA · KANSAS CITY · TULSA · LOS ANGELES
Main Offices - PITTSBURGH, PA.
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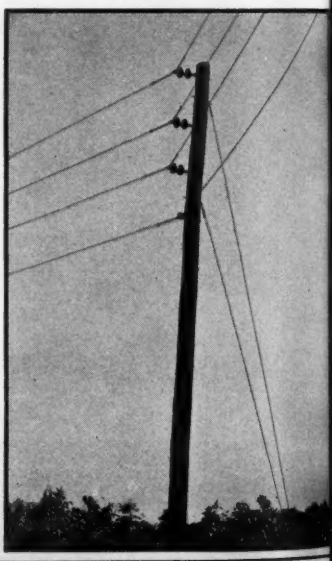
"... fit to be tied, Mister"

"THIS LINE's got just what the doctor ordered: long spans, A. C. S. R. conductors sagged to a gnat's eyebrow, and armor rods. I hate to say it, Mister, but we'll be a long time gone and she'll still be on the job." That's a lineman's opinion of a well-planned line, well built.

Aluminum Cable Steel Reinforced supplies the enduring strength which permits building long spans with safety. It keeps that line in service year after year, storm after storm. High conductivity allows for future growth of load. A. C. S. R. standards of construction assure freedom from interruptions, a minimum of maintenance.

Are you planning a new line, a rural extension or a transmission line? Our engineers will gladly give you any help you may need in selecting suitable conductors and in making preliminary designs. ALUMINUM COMPANY OF AMERICA, 2149 Gulf Building, Pittsburgh, Pennsylvania.



A·C·S·R

FOR RURAL LINE

FOR POWER TRANSMISSION

ALCOA

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All-Alloy RIDGID

saves you all wrench housing repair expense

HERE'S a sound way to cut your Company's tool expenses—get rid of pipe wrench housing repairs by standardizing on this famous all-alloy pipe wrench—and that means practically no wrench upkeep expense. Adjusting nut won't bind, spins easily in all sizes, 6" to 60". Sure action jaws of chrome molybdenum, handy pipe scale on full-floating hook jaw, heel jaw replaceable. Powerful comfort-grip I-beam handle—a safe efficient wrench in any use, as millions of users can tell you. Also made End Pattern for pipes against flat surfaces. For a wrench your men like to use and for economy you can take credit for achieving, buy the RIDGID—at your Supply House.

THE RIDGE TOOL CO., ELYRIA, OHIO

RIDGID PIPE TOOLS

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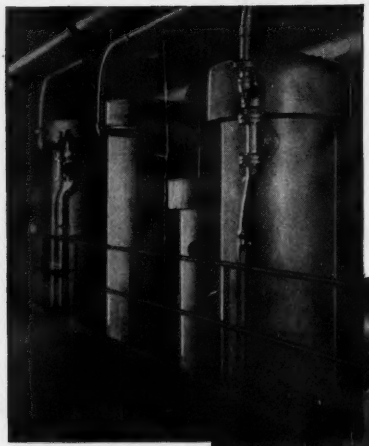
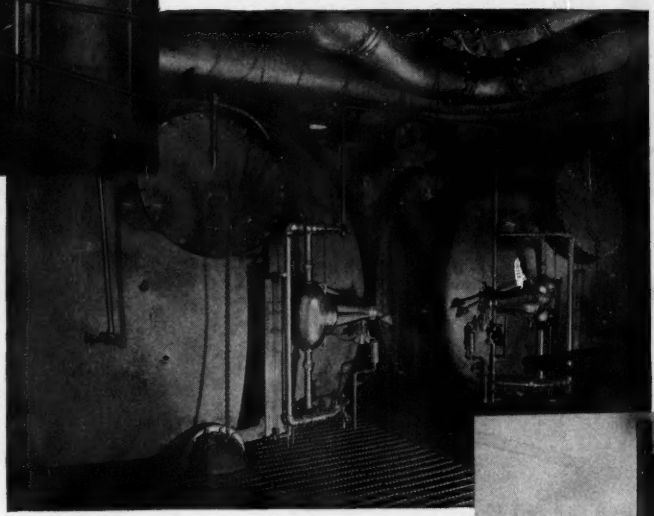
Deaerators and heaters by ELLIOTT

at the Williamsburg Station of the Brooklyn-Manhattan Transit Corporation . . . . . .





The six Elliott closed feedwater heaters in the Williamsburg Station extension. Those on the extreme ends of the battery are 200-lb. units, the two in the center are 30-lb. heaters, and the small units are drip coolers. Water circuit pressure on all heaters is 300 lb.

At right: These two Elliott 450,000 lb.-per hour horizontal deaerating heaters replace a single open type feedwater heater of older design. Constricted space required that the farther unit be built in sections to permit installation.

The recent extension of the Williamsburg Station is shown at the right of the picture above, towering above the older structure to which it is joined.

LAND COMES HIGH in the New York Metropolitan area — a big factor in the problem faced by the Stone & Webster Engineering Corporation in extending the Williamsburg Station of the Brooklyn-Manhattan Transit Corporation. Another factor was the need for dependable operation, since this station has no major inter-connection with any other power system for possible emergency use.

Both of these essentials were met in the case of feedwater heating and deaerating equipment, by the Elliott units shown above. As with all Elliott heat balance equipment, these units were tailored to the job in every respect, combining observance of conditions and limitations, with the broad experience of Elliott engineers in designing efficiently performing units. This experience is available without obligation for the improvement of any heat balance system. If you have a heat balance problem, bring it to Elliott through your consulting engineers.

• We should be glad to furnish you with bulletins and data describing Elliott heat balance equipment such as was used at the Williamsburg Station, and numbers of other installations. Write us.

N-946a

ELLIOTT COMPANY

Deaerator & Heater Dept., JEANNETTE, PA.

District Offices in Principal Cities

ELLIOTT Products include

TURBINE-GENERATORS • MECHANICAL DRIVE TURBINES • ENGINES • ENGINE-GENERATORS • CONDENSERS
MOTORS • GENERATORS • MOTOR-GENERATORS • DEAERATORS • FEED-WATER HEATERS • DEAERATING HEATERS
CENTRIFUGAL BLOWERS • DESUPERHEATERS • FILTERS • VACUUM COOLING EQUIPMENT • STEAM JET EJECTORS
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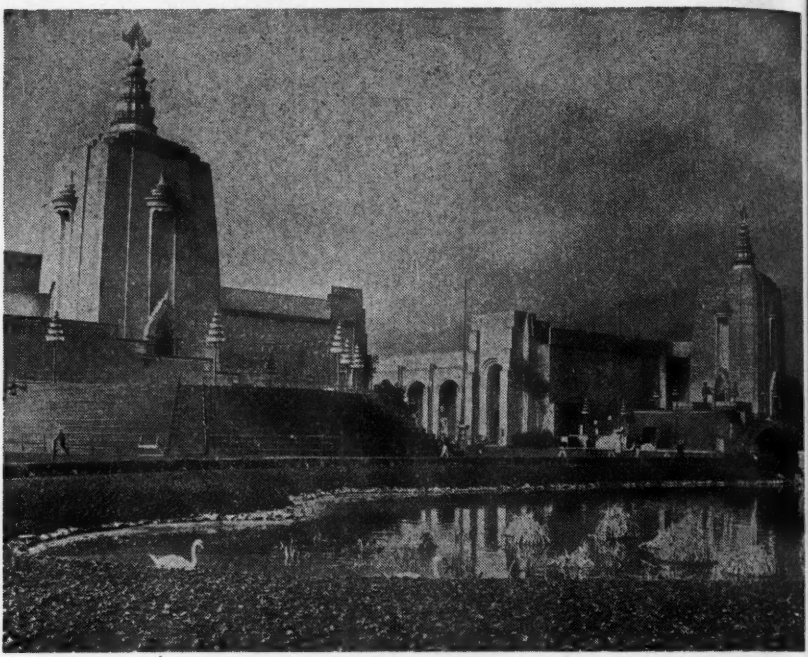
Utilities Almanack

JULY

20	Th	¶ *Canadian Transit Association will hold annual meeting, Vancouver, B. C., August 4, 5, 1939.*
21	F	¶ *Associated General Contractors, North and South Carolina Branches, open meeting, Myrtle Beach, S. C., 1939.*
22	Sa	¶ *American Transit Association will convene for session, San Francisco and Los Angeles, Calif., August 9–16, 1939.*
23	S	¶ *League of Iowa Municipalities will hold session, Cedar Rapids, Iowa, August 14–17, 1939.*
24	M	¶ *Second National Institute for Traffic Safety Training, National Safety Council, will be held, Ann Arbor, Mich., August 14–26, 1939.*
25	Tu	¶ *Appalachian Gas Measurement Short Course will be held, University of West Virginia, Morgantown, W. Va., August 21–23, 1939.*
26	W	¶ *Michigan Independent Telephone Association starts convention, Lansing, Mich., 1939.*
27	Th	¶ *Illuminating Engineering Society will hold convention, San Francisco, Calif., August 21–25, 1939.*
28	F	¶ *American Society of Civil Engineers ends 2-day session, San Francisco, Calif., 1939.*
29	Sa	¶ *"Telephone Day," 25th anniversary of first coast-to-coast telephone conversation, is celebrated, New York and San Francisco expositions, 1939.*
30	S	¶ *National Association of Railroad and Utilities Commissioners will hold annual convention, Seattle, Wash., August 22–24, 1939.*
31	M	¶ *American Water Works Association, Minnesota Section, will hold meeting, Duluth, Minn., August 24, 25, 1939.*

AUGUST

1	Tu	¶ *Maryland Utilities Association will hold fall convention, Ocean City, Md., August 25, 26, 1939.*
2	W	¶ *Pacific Coast Gas Association will hold convention, San Francisco, Calif., September 5–7, 1939.*



Towers of the East

(*Golden Gate International Exposition*)

Reminiscent of Burmese temples, these twin Towers of the East look out on the Lake of Nations on Treasure Island. The entrance in the center leads to the Court of Flowers.

Public Utilities

FORTNIGHTLY

VOL. XXIV; No. 2 JULY 20, 1939

Plain Talk on Debt Retirement From a Utility Bond Buyer

The financial history of the railroads and other industries proves conclusively, in the opinion of the author, that the idea of permanent indebtedness without provision for repayment of principal, as well as interest out of earnings, is fundamentally unsound when applied to corporate finance.

BY FERGUS J. McDIARMID

THE men who manage our utilities are as fine a class of citizenry as is to be found and their path is strewn with at least an average quantity of thorns. One would, therefore, be very inconsiderate indeed if in dealing with them one did not seek to avoid doing or saying those things which appear to be distasteful to them. One should, therefore, at all costs avoid reference to the idea that utilities as a class might well adopt a more active policy with respect to the repayment of their funded debts. To a good many utility executives such a suggestion appears to be a reflection on the competence of the management and to indicate a most craven lack of faith in the future of their companies. If you are foolish enough to broach such a thought in their presence, they will give you a look designed to make you feel like a Doubting Thomas. Then not knowing what else to do with such an unbeliever, they will pull out the latest earnings statement and point with a

kind of injured pride to the ascending load curve. At this point you will begin to appear in your own mind very much like a bull in a china shop and will feel compelled to say something nasty about the TVA to try and square yourself. But this will probably avail you not at all, and you will have to retreat into the outer darkness from which you came without being asked to stay for lunch.

Now let us look at the matter through the eyes of a lowly bond buyer. Back in the dear dead days beyond recall when fairly good bonds could be purchased to yield 5 per cent, such a bond could take a terrific battering and still produce an over-all yield which contained a large element of consolation for the bondholder. Assume that a 5 per cent bond maturing in thirty years were purchased at par. Assume in addition that at the end of fifteen years the issuing company were reorganized, the coupon rate cut to 3 per cent, and the principal finally repaid at maturity at the rate of 75 cents on the dollar. It would look rather bad for the bondholder, wouldn't it? However, as a matter of fact he would actually have obtained a return of 3.85 per cent on the entire transaction, allowing him nothing, of course, to defray the cost of aspirin. Because this bond buyer is a purely imaginary individual we may for the sake of illustration wish him even worse luck. Suppose that after fifteen years both the coupon rate and the face amount of his bond be cut in two. In such an event he would still net 3 per cent on his entire transaction, which is approximately the rate currently available on high-grade, long-term utility bonds.

However, a bond bearing a 3¼ per cent coupon sold at par contains no such cushion against adversity. If such a bond, running for thirty years, were to have both its interest and principal amount reduced by half at the end of fifteen years, the over-all yield on the entire purchase would be only about 1 per cent, assuming, of course, that the reduced amount of principal were paid at maturity. If, at the end of the fifteen years, the holder of the 3¼ per cent bond were simply paid off at 50 cents on the dollar, his net yield would be reduced almost to zero. A 5 per cent bond in such a circumstance would still have yielded over 2 per cent.

Such cold-blooded computations as these do not tell the whole story. They are, of course, based upon the assumption that the earlier coupons will be regarded in part as a return of principal.

The great majority of investors, including life insurance companies, are in the habit of taking full credit for investment income as they receive it, and do not set aside any substantial part of it to take care of capital losses. Indeed, with current low interest rates it would be very difficult to do this and to still earn even a fair net rate of return on invested funds. Life insurance companies carry their bonds, as long as they pay their interest, on an amortized basis which assumes that the principal will be repaid in full. If the principal is not repaid in full the institution is usually faced with a sudden capital loss, and if such losses occur upon a large enough scale and are compressed within a short enough period of time, they may have a seriously disturbing effect.

PLAIN TALK ON DEBT RETIREMENT FROM A UTILITY BOND BUYER

As interest rates decline it becomes a matter of increasing importance to the bond buyer that his principal be returned to him intact at maturity. The fact that a bond has a maturity date provides no guaranty or even assurance that the bondholder will get his money back on that date. It merely limits the period for which he agrees to accept a certain rate of return on his investment. If it can be said that utility bonds selling at current low yields present any considerable hazard that interest will not be paid when due, or that principal will not be repaid in full, investors will be well advised to leave them strictly alone and put their funds into government bonds, or even into the proverbial sock. The present difference in yield between the better grade of utility bonds and U. S. Government bonds is not sufficient to cover any considerable amount of excess risk. The prudent investor in utility bonds is, therefore, inevitably faced with the problem of trying to analyze this risk. In attempting to do so he inevitably stumbles into another question. Is the financial policy of the utilities such that the risk elements inherent in their bonds are reduced to a minimum?

There is no single thing which may be counted upon to give the investor in long-term utility bonds a more severe case of the jitters than to take a good long look at the present financial condition of the railroads. The present plight of the rail investor points quite clearly to the fact that we on this continent still have a great deal to learn about what constitutes sound corporate finance. We have witnessed the spectacle of railroad bonds with maturity dates set well on toward the end of the century going into default while the century is little more than a third over. These bonds by and large contained no mandatory provision for their retirement, even in part, before their maturity.

In checking over a list of 33 rail bonds, most of them comparatively strong issues, the writer found that 26 had no provision for debt retirement whatever. Five had sinking-fund clauses which were so weak as to be negligible. Only two had sinking funds which appeared to take the idea of debt retirement seriously. These two were recent issues of strong roads.

It simply hasn't been the custom to incorporate sinking funds or other mandatory provisions for debt retirement in rail securities. This has involved the tacit assumption that the earning power of the railroads would last forever or at least for a hundred years, which is nearly the same as forever. And investors were found in abundance who swallowed these bland

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assumptions. In practice this means that the widows' and orphans' capital, the bonds, receive a modest return while the industry enjoys prosperity, and in the end when the industry enters the down grade, the senior capital is likely to suffer pretty much the same fate as the junior.

THERE are a number of historical characteristics of the rail picture which the utility investor may well study to his advantage. Railroad profitability, as measured by the rate of return earned upon the stated investment in road and equipment, reached a high point in 1907. From that year, except for an upward flurry in the roaring twenties, it declined steadily. After 1907 the railroad investment continued to expand and has since that year more than doubled. However, declining earnings made the issuance of stock very difficult, and the expanding investment had to be financed largely from the sale of bonds and out of earnings. In spite of this the bonded debt in relation to the depreciated carrying value of road and equipment did not increase.

The proportion of gross operating revenue which the roads were able to turn into net reached a high point in 1902 and thereafter declined. Net profits per ton mile also reached a peak in 1902.

FROM the financial experience of the railroads and certain other industries which have absorbed large amounts of capital, it is possible to draw certain clear-cut conclusions which may be regarded almost as axiomatic.

1. Private industries, no matter how secure their outlook may seem, should not count on an indefinite continuance of earning power. For this reason the idea of permanent indebtedness as applied to a private industry is fundamentally unsound.

2. An industry almost always reaches and passes its most profitable stage a considerable time before its physical stature attains a maximum. Therefore, if it does not begin to retire debt while it is still growing, its debt will probably never be retired.

3. An industry which is subject to public regulation tends over a period of time to become unprofitable, due to pressure for a lower selling price for its product and the pressure of rising costs including taxes. The theory that an enterprise is entitled to a fair return on its investment provides no safeguard against this tendency.

4. The mere fact that an industry continues to be an economic necessity is no guaranty that it will continue to prosper financially.

Such conclusions as these suggest some very obvious questions to the investor in the bonds of our electric utilities. At what stage of their financial history have these utilities now arrived? What is their policy and atti-

EARNINGS RECORD OF 62 MAJOR ELECTRIC UTILITIES

	Operating Revenue (millions dollars)	*Net Earnings before Depreciation and Interest* (millions dollars)	*Net Earnings As a Per Cent of Operating Revenue*
1929	1,027	518	50.5%
1933	940	473	50.4
1937	1,191	543	45.5

Bonds of Life Insurance Companies

"LIFE insurance companies carry their bonds, as long as they pay their interest, on an amortized basis which assumes that the principal will be repaid in full. If the principal is not repaid in full the institution is usually faced with a sudden capital loss, and if such losses occur upon a large enough scale, and are compressed within a short enough period of time, they may have a seriously disturbing effect."

tude with respect to the retirement of their bonds?

IT is the belief in some quarters that the electric utility industry has already passed the most profitable stage in its history. In order to throw a thin ray of light on this rather vital matter, we recently made a study of 62 major utilities whose earnings record can be carried through on a consistent and comparable basis from 1929 to 1937. The electric businesses of these representative companies make up somewhat over half of the entire electric utility business of the country. Some of the more illuminating results of this study are presented briefly in the table on page 70.

Earnings before depreciation were considered so that real results would not be obscured by the marked change which took place during this period in the manner in which many companies charged for depreciation.

It will be observed that the companies were able to reduce operating expenses, maintenance, and taxes in proportion to the decline in their revenues from 1929 to 1933. However, in the recovery period from 1933 onward these out-of-pocket expenses increased at a relatively faster rate than revenue. Admittedly, the ratio of earnings to revenue provides a very incomplete criterion of the trend of profitability in the industry, but in so far as it may be conceded to do so it indicates an unfavorable trend. Operating expenses and especially taxes appear to be encroaching upon earnings.

CONTINUING into 1938 the same trend is discernible. We increased the range of our study to 72 utilities and compared their showing in the first nine months of 1938 with the corresponding period in the preceding year. Operating revenues had declined on the average by around 1 per cent, while net earnings, again taken before depreciation, declined 4 per cent. More significant was the fact that in only 17 out of the 72 cases did net earnings show a relatively more favorable trend than gross operating revenue.

The above figures are not entirely conclusive, but they stimulate some pretty serious thinking. What then is behind these trends, and is there any possibility of their reversal? First of all, is the matter of steadily rising

taxes. With a badly unbalanced Federal budget and with many local budgets in far from healthy shape, any possibility of decreasing taxes in the foreseeable future must be consigned to a realm of wishful thinking. Further increases in taxes are to be expected for armaments and to balance ordinary budgets. Turning to other fields of possible expense cutting does not uncover any more hopeful possibilities. Wages and fuel costs tend to become increasingly frozen at relatively high levels. In fact the cards appear to be pretty consistently stacked in favor of a continued trend toward lower profit margins.

THIS, of course, does not mean for an instant that the gross operating revenues of the electrical industry will not continue to grow for a long time yet. The gross revenue of the railroads continued to grow for at least two decades, following the period in the early years of the century when railroad profit margins, in terms of a percentage of gross, were the largest. An investment analyst estimated recently that kilowatt-hour consumption in this country would increase 38 per cent over the next ten years. He stated that his estimate probably erred on the side of optimism. One is taking a very great chance in making estimates of this sort. A much safer one is the prediction that future increases in electric usage will carry with them a much lower margin of profit than does the load already on the lines.

The great hope for building up the domestic load is through the increased use of heat-consuming appliances and these require a low rate to encourage their use. Likewise chemical and metallurgical industries which are large potential users of power must have very cheap power to render their operations profitable. It is altogether likely that net earnings will continue to increase for some time yet, although at a slower rate than operating revenues. Sooner or later, and maybe sooner than we expect, the absolute amount of net earnings of the industry will start to decline—that is, unless the electrical industry is unlike all other industries that have gone before it, including the railroad industry, the telegraph industry, and the horse collar industry. Of course, there are those who will argue that the electrical industry really is different, but on that point we would prefer to keep our fingers crossed.

IF the outlook for electric utility earnings as outlined above is at all plausible, then the matter of bond retirement becomes of primary importance. What is the attitude of the utilities themselves toward the retirement of their funded obligations? This attitude is clearly reflected in the indenture provisions of the large number of utility bond issues brought out in the past four years. These issues were brought out in a seller's market, and the bond buyer has been in a very poor position to exert pressure to have proper protective provisions incorporated in indentures. The actual situation confronting the utility bond buyer is somewhat illuminated by a study which the writer recently had reason to make of 52 utility bond indentures. Each of these issues was the obligation of a different company, and each was the obligation of a good-sized utility doing a business which was en-

irely or mostly electric. These bonds were all new issues of the last three or four years and they provide, I believe, a pretty good cross section of utility bonded debt. The results of the study were rather interesting, and at the risk of being statistical I shall present them briefly.

Of the 52 bonds, 10 bonds, or 19 per cent, had no sinking fund or other provision for debt retirement. It is true that most of these bonds were issued by companies at present in a strong condition, but it is doubtful if any of them are any stronger than the New Haven Railroad was thought to be thirty years ago. Its bonds now sell at about 15 cents on the dollar.

FIFTEEN bonds, or 29 per cent of the total, had a provision under which a certain minimum percentage of gross revenues is to be spent for maintenance, property additions or replacements, or debt retirement. Criticism of such provisions is twofold. In the first place the minimum percentages to be so expended did not appear to be large enough, in no case exceeding 15 per cent of gross, and sometimes going as low as 10 per cent. In the second place such a provision gives no absolute assurance of debt retirement. Such a provision in railroad bond indentures would have done little to forestall the present situation.

Thirteen bonds, or 25 per cent of the total, had a provision by which an amount equal to a certain percentage of the bonds outstanding is to be spent annually for net property additions or debt retirement. The percentages ranged from 1 to 3¼ per cent. Such a provision is a step in the right direction. It is designed to increase the ratio of property to debt. However, it gives no absolute assurance of the retirement of individual bond issues so long as the property account continues to grow at a fairly rapid rate.

In the last group were 14 bonds, or 27 per cent of the total. These bonds had definite provision for sinking funds with no strings attached. A percentage of the outstanding bonds, usually one per cent, is being retired annually. The utilities issuing these bonds constitute our honor roll.

THAT is the story. It is hardly one to inspire the investor who has studied investment history with any large amount of confidence. It is in rather abrupt contrast with the record of the leading publicly owned electric utility enterprises on this continent. These enterprises appear to entertain the idea that money borrowed is some-

¶ "WHEN *a person or institution buys the bonds of a utility he is in effect lending money upon the security of certain property items of a certain efficiency and state of maintenance, and upon a definite record of past earnings. It would seem logical that this debt should be retired within the average lifetime of the property against which the money is loaned. If this is not done the bondholder in effect suffers forced reinvestment of his funds in other property items for an indefinite period in the future.*"

thing to be repaid. They do not subscribe to the theory of permanent indebtedness. Take the Los Angeles Bureau of Power and Light for example. All of its outstanding obligations are serial bonds, the longest ones maturing in 1978. The municipal electric system of Seattle is likewise entirely financed by serial obligations, the longest ones falling due in 1964. The Seattle system plans to have all of its bonds which are now outstanding retired before a great deal of private utility debt comes up for refunding in 1965 and the years immediately following. Even municipalities themselves, which have an infinitely better expectation of a permanent income than any private corporation, make it a standard practice to issue either serial bonds or bonds with a sinking fund attached.

The experiences of the last decade have driven home to mortgage lenders the fundamental unsoundness of real estate mortgages without any provision for amortization. The great majority of new lending is being done on a basis which provides for the systematic repayment of principal. Perhaps the greatest single contribution of the Federal Housing Administration to sound home finance in America has been to make the inclusion of really adequate principal repayment provisions in residential loans almost universal. A relapse to the old system of period loan renewal with no provision for debt reduction in the interim is unthinkable in the mortgage field.

IN the field of corporate finance there is one outstanding practical example of the manner in which the systematic retirement of debt has served the best interests of the American investor. That example is provided in the history of railroad equipment trust certificates. It is the more or less standard practice of our railroads when purchasing equipment to pay 20 or 25 per cent in cash and finance the balance by means of notes payable over fifteen years or less. The average lifetime of railroad equipment is at least twenty-five years. The life of a railroad locomotive is about the same as that of a steam turbine in a generating plant. In the whole history of American railroading the losses to investors in this type of financing have been negligible. Today we have the spectacle of the mortgage bonds of bankrupt roads selling at 20 cents on the dollar, while the equipment obligations of the same roads sell on a 3½ per cent basis. And let it be added that just because a railroad retires its equipment debt is no indication in the world that it never expects to buy any more equipment.

With such examples before them why do not more of the utilities see the light? What specific arguments do they raise against the systematic retirement of bonds through fixed sinking fund or serial repayment provisions. Their main argument is somewhat as follows: "We feel it is foolish to retire bonds when at the same time we will probably have to reborrow to expand our plant. Such a procedure would be expensive and wasteful. Of what avail is it to retire certain bonds as long as our total indebtedness remains constant, or increases? If our industry were static or contracting, then talk of debt retirement would be quite proper, but for an expanding industry such as ours to retire bonds doesn't make sense."

Systematic Retirement of Bonds

"THE systematic retirement of bonds, even if this were accompanied by new borrowing, would help to equalize the selection at present exercised against the bondholder, especially with respect to interest rates. In failing to provide for such retirement the utilities have tended to favor the large investor as against the small investor who seeks safety for his funds above all else."

THAT in brief is the case of the utilities and no doubt it appears almost flawless from their point of view. Unfortunately from the bondholder's point of view it leaves considerable to be desired. It seeks to make of the bondholder a partner in the business — a silent and poorly rewarded partner — instead of a money lender, which should be his true position.

When a person or institution buys the bonds of a utility he is in effect lending money upon the security of certain property items of a certain efficiency and state of maintenance, and upon a definite record of past earnings. It would seem logical that this debt should be retired within the average lifetime of the property against which the money is loaned. If this is not done the bondholder in effect suffers forced reinvestment of his funds in other property items for an indefinite period in the future. These other property items may not possess the same earning power as those upon which the loan was originally made.

Of course, it may be claimed that when an investor ceases to like a given situation he can always get out by selling his bonds. This may or may not be possible. A year or so ago the writer was discussing the bonds of a certain utility which happened to be under a cloud with an official of one of the largest life insurance companies.

"Are you thinking of selling your bonds in that company?" I asked.

He gave me a queer look and replied, "You're kidding me, aren't you? We couldn't get out of that situation if we wanted to. We have $9,000,000 of those bonds. If we attempted to sell out it would break the market all to pieces. It would be a physical impossibility to do so."

This state of affairs is becoming true of a steadily mounting proportion of utility debt—that proportion which is held in large blocks by large institutional investors.

THE supposedly wasteful process of repaying and reborrowing has a great deal to recommend it from the viewpoint of the investor. It would greatly minimize the adverse selection against him with which most recent utility bond issues are heavily loaded. This selection arises from two main sources, a possible decline in the financial strength of the borrower and a possible rise in interest rates.

Through a process of systematic debt repayment accompanied by reborrowing if necessary, the investor is given an opportunity to reappraise a given situation at regular intervals, of staying out or going in again, and in the latter case of demanding an interest rate commensurate with any change in the risks involved. By forcing them to present their case anew to investors periodically the utilities would be forced to set up and maintain certain standards of financial housekeeping. Also, before embarking on a program of property expansion it would be necessary for managements to sell investors on the economic soundness of such a program. Since managements by their very nature are inclined to be optimistic about such things, this would act as a valuable curb upon uneconomic overexpansion from which not a few American industries have suffered in the past.

THEN there is the matter of interest rates. Suppose that I purchase a 30-year 3¼ per cent utility bond at 100. Suppose, moreover, that at the end of ten years interest rates rise to a point where my bond sells on a 4¼ per cent basis. If I am forced to sell at this time I receive not 100 but 86.6 for the bond and have netted not 3¼ per cent but 2.2 per cent on my investment. If it be assumed that I am forced to sell my bond on a 4¼ per cent basis after only five years I will receive only 84.7 for it and will have netted only .2 per cent on my investment. It would almost have paid me to keep my money in a sock. This is the sort of hazard which keeps those responsible for the investment of large sums of money in long-term bonds at low rates of interest awake at night. Totally different is the position of the utilities themselves. When interest rates decline the utilities are able to take advantage of this by calling their bonds and issuing lower coupon bonds in their place.

To correct the one-sidedness of the present set-up in corporate finance, the chief investment officer of the largest British insurance company recently proposed that the terms of corporate borrowing should never be fixed for longer than ten or, at most, fifteen years. At the end of such a period, not only the borrower but the lender would have the right to change these terms. The net effect of this suggestion could be attained by the systematic retirement of debt at a rapid enough rate.

DOESN'T this whole matter of debt retirement boil down to the manner in which the earnings of the industry are to be split between the bondholders and the owners of the junior securities? When a bond is bought the purchaser not only pays for a series of coupons; he also pays for the return of his principal. And do not forget for an instant that the principal as well as the coupons can only be paid out of earnings. The ownership by the company of a large amount of property which at one time cost a lot of

money to build can provide no assurance for the repayment of bonds.

The managements of some utilities have on occasion been brutally frank in giving the reason why they are unwilling to put sinking funds into their bonds. If they did this it would cut down the amount of money available to the holding company in dividends. The bondholder is in most cases putting up the greater part of the actual equity in the enterprise. Sometimes, indeed, we run into instances in the utility field where the bonds appear to amount to close to a 100 per cent mortgage on the property value, after the museum pieces have been kicked out of the property account and proper deduction made for depreciation and obsolescence.

CERTAINLY a large proportion of American utilities are far too heavily bonded for the word "bond" to have its traditional meaning. Nevertheless the bondholder is asked to accept a rate of return varying from around 3 per cent on the best issues to 3¾ per cent on second-grade issues, while the utility claims to be entitled to earn a return of at least 6 per cent on the entire value of its property. Often the return actually earned on a conservative value of its property by a well-situated utility will run considerably more than 6 per cent. In these circumstances it would seem entirely possible to do a little something for the bondholders by way of a sinking fund and still leave the stock interest a very favorable return on its true equity in the enterprise. It might even be suggested that regulatory authorities take into account the willingness of utilities so to protect their bondholders, in determining the allowable rate of return which they may earn on their properties.

There are also certain social aspects of the matter to be considered. The bond interest in our utility enterprises represents by and large the interest of the small investor—or his widow—the interest of a party who cannot afford to and usually does not want to take a chance with his savings. This is especially true of that portion of utility indebtedness held by savings banks and life insurance companies. The proportion of public utility bonds so held has been increasing rapidly.

AT the end of 1938, forty-nine of the largest life insurance companies, owning over 92 per cent of the life insurance assets of the country, held in their portfolios $3,254,000,000 of utility bonds. These holdings represent close to a quarter of the utility debt of the country. The proportion of

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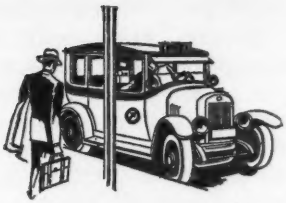
electric company debt so held is probably even higher than this. During the year 1938 these companies increased their utility investment by $431,000,000, representing over one-third of the total increase in their invested assets. It appears, therefore, that in failing to provide the bondholder with sinking-fund protection the utilities are adopting a course detrimental to the interest of the small investor in order that the larger investor who owns the stock interest may be more richly rewarded. This course becomes the more difficult to defend when it is realized that in a good many cases the real equity of the common stock interest in the business consists to a considerable extent of rather thin air.

It should not be assumed for a moment that just because life insurance companies and other large institutional investors continue to invest in utility bonds that they are giving their entire approval to the manner in which these bonds are set up. As we said before, they are operating in a seller's market. With railroad credit under a cloud and the demand for new mortgage money continuing at low levels, they are literally forced to buy utility bonds in order to keep at work their constantly mounting funds. Such investors long for the time when they will have a real say as to the terms of utility borrowing. On the too rare occasions when they are now in a position to do so they usually insist on a sinking fund or upon the retirement of part of the mortgage debt through the issuance of serial debentures. Some investors believe that such serial debentures with provision for pay off within a foreseeable future are really sounder securities than the 30-year mortgage bonds to which they are legally junior.

THE points set forth in this article have been spun out to some length but they may be summarized in a few sentences. The low interest rates currently available on public utility bonds provide very little margin of excess interest to take care of capital losses. The financial history of the railroads and other industries proves conclusively that the idea of permanent indebtedness, without provision for repayment of principal as well as interest out of earnings, is fundamentally unsound when applied to private corporate finance.

There is reason to believe that the electric utility business has already passed the peak of its profitability which makes the idea of debt retirement that much more urgent. Nevertheless the sinking fund and other provisions for debt retirement contained in the recent bond issues of such companies are on the whole inadequate and disappointing. The systematic retirement of bonds, even if this were accompanied by new borrowing, would help to equalize the selection at present exercised against the bondholder, especially with respect to interest rates. In failing to provide for such retirement the utilities have tended to favor the large investor as against the small investor who seeks safety for his funds above all else.

While reference has been made especially to the electrical industry, the arguments presented apply, of course, to other public utility industries as well. In the case of the traction and telegraph industries it appears that the bondholder's horse has already departed from the stable.



Why Our City Streets Need Better Lighting

The greatest automobile hazards are at night, nearly two-thirds of the fatalities occurring while less than one-third of the traffic is moving. Accidents due to poor visibility.

By EARL J. REEDER
CHIEF TRAFFIC ENGINEER,
NATIONAL SAFETY COUNCIL

THE marked reduction in traffic accidents in 1938 has given strong encouragement to public officials and others who have the responsibility for protecting vehicle passengers and pedestrians in their use of the streets. It has shown that when substantial things are done for safety, traffic accidents can be greatly reduced. It has paved the way for the application of more safety measures which have demonstrated their effectiveness in reducing accidents.

In proportion to the amount of exposure, by far the greatest traffic hazards are at night. It is then that nearly two-thirds of the fatalities occur while less than one-third of the traffic is moving. In many cities the proportion of accidents at night is even higher.

It is true that driving after drinking is more frequent at night and that fatigue is a greater factor at that time than in the daytime. More intoxicated pedestrians stagger into the paths of moving traffic at night. At the most, however, these do not account for more than half the increase in accident frequency during darkness. The biggest factor is lower visibility.

Various things have been done to improve visibility in traffic at night Improvements have been and are being made in vehicle headlamps and these must continue to be the major source of visibility at night on rural highways. Reflectorization of signs and markers plays an important part, particularly in rural areas. Center lines and other markings, showing the alignment of the road, help to depict to drivers the general conditions confronting them if these conditions are not too complex.

On some of the major rural roads, and on practically all city streets, complex traffic conditions make these protective measures inadequate. Where

pedestrians are many and must mingle with other traffic, hazards at night are particularly acute. Pedestrians seldom carry lights. Their clothing is often dark and does not readily reflect light from headlamps. Their presence in the street in front of a vehicle, whose driver is facing the headlights of some other vehicle, is difficult to distinguish. For these reasons the pedestrian accident problem in cities is particularly acute at night. This problem accounts for a large part of the night accidents and, particularly, of the fatalities in urban and suburban areas.

It is in such places that the need for better visibility for traffic safety combines with other incentives, such as crime prevention and city beautification, to make street lighting a necessity. In former days the importance of safety was subordinate to other factors in street lighting, but increased numbers and speeds of vehicles and greater complexity of traffic have made accident prevention the outstanding objective in present-day street lighting installations.

Much of the lighting of city streets in the past has not been adequate for traffic safety at night. Lights have been commonly installed only at street intersections, often suspended over their centers. Mid-blocks have gone without street lighting in most cases. Often where some mid-block lighting was provided its value was largely dissipated through lack of proper direction.

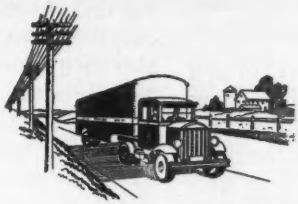
Good safety lighting is more than so many light sources per mile. It is not necessarily high intensity of lighting. It is direction and distribution properly applied to provide seeing as things can best be seen at night.

In the daytime intense light from the sun is greatly diffused and we are able to see many surface details of any object at which we look. There is plenty of light for reading even in a shadow beneath a tree or back of a building, although the direct rays of the sun are interrupted and light reaches the shaded spot only by reflection from many objects.

At night, seeing on a street or highway is entirely different. The cases are few in which there is sufficient light to reveal many surface details of objects in the road as one drives along. Objects are more commonly seen by silhouette against the brighter surface illumination of the pavement by lights ahead.

To provide this condition light sources must be properly spaced and installed at the appropriate height to give a moderately uniform distribution of pavement brightness as one drives along the street. This should be the minimum condition for traffic safety lighting. In some places where the traffic is more complex and seeing by silhouette is interrupted by other vehicles, more light must be provided and seeing by surface detail must be brought into the process of illumination.

Good lighting means proper direction of the light onto the pavement so that maximum use will be made of it in protecting traffic. There is no need to disperse the light into the sky, onto treetops, and against building fronts. This is not a necessary part of safety lighting. To avoid this means the installation of luminaries with proper reflectors and refractors for distributing the light upon and along



Improvement of Night Visibility

"VARIOUS things have been done to improve visibility in traffic at night. Improvements have been and are being made in vehicle headlamps and these must continue to be the major source of visibility at night on rural highways. Reflectorization of signs and markers plays an important part, particularly in rural areas. Center lines and other markings, showing the alignment of the road, help to depict to drivers the general conditions confronting them if these conditions are not too complex."

the roadway and the adjacent sidewalks.

One claim that should be avoided in talking about traffic safety lighting is the provision of daylight conditions at night. This simply is not done. However, it is not necessary because daylight provides more than the necessary amount of light for traffic safety much of the time.

Daylight provides the extreme of seeing by surface detail and at some times of the day it provides extreme glare for vehicles going in certain directions. There is no better proof of this than the fact that many people use sun goggles to shield their eyes from the brilliant rays at different times of day, when driving considerable distances.

Good street lighting should be properly distributed and of only sufficient intensity to provide unmistakable visibility on a uniform basis at night. More than that is unnecessary for safety although in some cases it may be provided for other reasons.

A common misapplication of lighting for traffic safety is to confine it to boulevards and other busy streets in the better parts of cities. This often results from the desire for beautification of such streets and for crime prevention in the better social and economic areas. Studies by the National Safety Council's Committee on Pedestrian Control and Protection have shown that pedestrian accidents are nearly always most frequent in areas of lower social and economic status. Too frequently street lighting is neglected or substandard lighting is installed in such places. This considers only the social and economic side of the question and overlooks the safety of human lives. While we may install lighting in the better areas for a combination of safety and other reasons, we should

not overlook the need for safety lighting in other sections.

OFTEN, in a lower class area or in a suburban district a few street lights are installed here and there without much consideration of the need for safety. However, it is often in such locations that pedestrians must walk upon the pavement because of a lack of sidewalks. Or, children must play in the streets for lack of other places to play. In such locations the population may be most dense and pedestrians may wander across the street rather aimlessly in "whiling away" their leisure hours. Again, it may be in such areas that the aged, the decrepit, and the irresponsible children may be found in the street unprotected by persons who are more alert or have better judgment. It is in such places, also, that drunken pedestrians may more frequently stagger into the street in the path of traffic. All of these conditions combine to make the lower type of social and economic areas places where good night visibility is essential for safety.

An important part of the present opportunities for installation of street safety lighting is in the improvement of existing lighting systems where a high ratio of night to day accidents has developed, and particularly where night accidents have most frequently involved pedestrians. For identifying these locations access to good accident records is important. It is seldom possible to revamp completely the lighting system of an entire city. Rather, it is necessary to approach the improvement of lighting by consecutive steps, selecting the places of greatest need first, according to the accident records and, thus, obtaining the greatest effects in accident reduction first. In doing this the day accidents should be considered the indication of the hazards of the given street under normal daylight conditions. Where the ratio of night accidents to day accidents is the greatest, traffic is obviously experiencing its most serious difficulties at night.

WHILE the improvement of illumination on streets now having some light must proceed on a selective basis, attacking those areas with the highest ratio of night to day accidents first, every new design and construction of streets should include adequate provision for lighting where it will be needed for safety. It is in this original construction that the posts can be properly spaced, conduits can be installed, and the requirements of safety lighting can be applied better than at any subsequent time.

Wherever a city street or a rural highway is to be lighted, records of accidents should be assembled for a sufficient time before the installation to make possible a convincing comparison with similar records afterwards. "Before and after" records should be obtained concerning the volumes of traffic, speeds, numbers of pedestrians, and other quantitative information which will be valuable in showing the effect of lighting upon traffic movement and safety.

It is not sufficient merely to keep a record of the total number of accidents. An analysis should be made of the types of accidents which have occurred before and after installation or improvement and of the specific locations where they occurred, because this adds to the total information concern-

ing the types of accidents which lighting will prevent and helps to arm public officials for the proper decision concerning other proposed or requested installations. This is the type of information that is being sought by such organizations as the National Safety Council's Committee on Night Traffic Hazards to supplement the data that have been gathered so far. It will increase the evidence concerning the real values of lighting and will greatly aid in establishing future policies concerning lighting improvements.

THE improved conception of what constitutes good safety lighting and the increased public interest in all phases of accident prevention make the lighting of streets and highways for real traffic safety a very timely subject.

The assurance that properly directed measures do prevent accidents, resulting from the remarkable accomplishments of 1938, has paved the way for more to be done in every phase of traffic safety activities which have demonstrated their effectiveness.

This is a particularly appropriate time for the promotion of improved lighting in places where the records and experience reveal its need.

Protection from the Prowling Pink Pachyderm

"ADVERTISING *men live in a world of their own, beset by peculiar emergencies. Everything there is designed to resist an impossible stress; every mind is bent on guarding against cheese-dream disasters. We have studied the people in the advertisements for years, appalled by the dangers that surround them, but it was only last week that we came on what seems to us the final dilemma. The new Frigidaire, ladies and gentlemen, is built to support the 'crushing weight of a 4-ton elephant,' and the company has published a picture to prove it—there before your eyes is the elephant, looking proud though strange; there beneath him, the icebox, imperturbably making ice. Fortunate indeed, we thought, is the alert hostess whose refrigeration is guaranteed against elephants; unhappy the old-fashioned woman who sooner or later, probably when the boss and his wife have come to dinner, will hear a creak, a trumpeting, a fearful crash, and know she is undone.*"

—EXCERPT *from The New Yorker.*

Federal Competition May Be Unconstitutional - but?

Article II

In the previous article the author gave the historical and philosophical background of the Supreme Court TVA decision, holding public utilities without power to question alleged illegal competition with them. In this article he discusses the decision itself and its significance in respect to the protection of property rights against illegal acts of government officials.

By WILLIAM M. WHERRY
OF THE NEW YORK BAR

In the TVA Case,[1] it appeared that the statute created a corporation to build a series of dams on the Tennessee river and its tributaries. Ostensibly, the act was based on the power of the government to control navigation and navigable streams. But it was openly advertised at the time and widely publicized that the real purpose of the act was to develop electric power and to regulate the electric power business in the territory by competition and by the establishment of a yardstick for measuring private electric rates. Eighteen public utility corporations already established and distributing electricity in the states in which the Tennessee Valley Authority proposed to operate filed a suit for an injunction, claiming that the statute was in violation of the Constitution; that the enterprise was unlawful, and that, therefore, the action of the officers, who were the defendants, was also unlawful. Since their action inflicted direct and special injury on the complainants, for which they had no adequate remedy at law, the plaintiffs claimed that they came clearly within the cases which hold that such illegal action can be enjoined even though the defendants were government officials.

The prevailing opinion was written by Justice Roberts, and he states the doctrine invoked succinctly and clearly as follows:

> The appellants invoke the doctrine that one threatened with direct and special injury by the act of an agent of the government which, but for statutory authority for its performance, would be a violation of his legal rights, may challenge the validity of the statute in a suit against the agent.

Having stated this principle clearly, the court then considered whether the

[1] (U. S. Sup. Ct. 1939) 27 P.U.R.(N.S.) 1, 5, 6.

appellants had presented a case which comes within it. In other words, have the defendants a legal right which is being violated by the official acts complained of?

THE cases which have discussed and established this right may be summarized by stating that the plaintiff must have a special right not in common with the general public, and the act complained of must be of such a character as would injure it in its property or person. In other words, it must be a legal right and not a political one, and in this instance a right of property.

Where the dissenting opinion differed from the prevailing opinion is at this point, for Justice Roberts and those who concurred with him held that the right invaded by the Tennessee Valley Authority was not a property right and therefore was not such a right as the court could protect. He, therefore, held that the court had no jurisdiction to review the act of Congress or to consider whether the statute was within its powers or not. In making this decision, Justice Roberts rested his opinion on the fact that even though the plaintiffs had established businesses in the territory under franchises granted by the states, their charters were not exclusive, and, therefore, he says, they had no right to be protected from competition. He says:

> The vice of the position is that neither their charters nor their local franchises involve the grant of a monopoly or render competition illegal.

In other words, the learned judge, in effect, says since they have no monopoly, and the state might lawfully permit competition with them, they have no right to be protected from unlawful competition.

This is clearly a fallacy in logic. The justice states, what is undoubtedly true, that the state can grant a franchise to someone else, but omits to state that even such a franchise must be legally enacted to be effective, and that if no valid franchise is held by a competitor the competition would be unlawful.

IT does not follow that because competition may be legal under certain circumstances, it is legal under all circumstances. No one can engage in a public utility business without a franchise from the state. The holder of a franchise, whether exclusive or not, therefore, is not subject to competition by anyone who does not hold a lawful franchise, and he would have a right to enjoin the competition by anyone who did not hold such a franchise.

Suppose, for instance, that an agent of the state claimed to be the holder of a charter granted by the legislature, authorizing competition with an existing utility, would not that utility have a right to show that the legislature which purported to pass the statute granting the charter was not legally constituted, acted irregularly, or acted in violation of the powers granted to it by the Constitution? If the legislature had already adjourned before the alleged statute was passed, competition thereunder would clearly be illegal. The same thing is true if the statute violated the Federal or state Constitution. In all of these cases, merely because the existing utility could not prevent lawful competition would be no reason for denying it the right to enjoin the unlawful competition.

JUSTICE Roberts attempts to reinforce his argument by saying:

> The appellants further argue that even if invasion of their franchise rights does not give them standing, they may, by suit, challenge the constitutionality of the statutory grant of power the exercise of which results in competition. This is but to say that if the commodity used by a competitor was not lawfully obtained by it, the corporation with which it competes may render it liable in damages or enjoin it from further competition because of the illegal derivation of that which it sells. If the thesis were sound, appellants could enjoin a competing corporation or agency on the ground that its injurious competition is ultra vires, that there is a defect in the grant of powers to it, or that the means of competition were acquired by some violation of the Constitution. The contention is foreclosed by prior decisions that the damage consequent on competition, *otherwise lawful*, is in such circumstances damnum absque injuria, and will not support a cause of action or a right to sue. (Italics supplied.)

The significant words in this quotation are those italicized above. Here it seems to me the learned judge begs the question.

The very point at issue is whether a government agency can lawfully compete, even if it holds a state permit. The *ultra vires* rule applicable to private corporations is an exceptional, arbitrary rule which prevents the real facts from being shown, and ought not to be extended to protect the illegal acts of government agents. Every member of the public has an interest in seeing that government agents do not misappropriate public funds by *ultra vires* acts, which is not necessarily true in the case of private corporations.

The dissenting opinion by Mr. Justice Butler, in which Mr. Justice McReynolds joined, takes issue with the prevailing opinion, in the following language:

> The bill prays invalidation of the act as unconstitutional and injunction and other relief against defendants.
>
> Unquestionably, the bill shows that complainants are not asserting a right held or complaining of an injury sustained in common with the general public. They allege facts that unmistakably show that each has a valuable right as a public utility, nonexclusive though it is, to serve in territory covered by its franchise, and that, inevitably the value of its business and property used will suffer irreparable diminution by defendants' program and acts complained of. If, because of conflict with the Constitution, the act does not authorize the enterprise formulated and being executed by defendants, then their conduct is unlawful and inflicts upon complainants direct and special injury of great consequence. Therefore, they are entitled to have this court decide upon the constitutional questions they have brought here. See Massachusetts *v.* Mellon (1923) 262 U.S. 447, 488, 67 L. ed. 1078, 1085, 43 S. Ct. 597; Frost *v.* Oklahoma Corp. Commission, 278 U.S. 515, 521, 73 L. ed. 483, 488, P.U.R. 1929B, 634, 49 S. Ct. 235.

WHAT we have then in this decision is a distinct limitation on the right of utilities operating under franchises to be protected from competition from private utilities as well as from public agencies allegedly exercising unlawful and unconstitutional powers.

Here we recognize again the issue raised in the famous Warren Bridge Case[2] as to whether the state can destroy private investment, which it had

[2] Charles River Bridge *v.* Warren Bridge (1837) 11 Pet. 420, 9 L. ed. 773.

¶ "No *one can engage in a public utility business without a franchise from the state. The holder of a franchise, whether exclusive or not, therefore, is not subject to competition by anyone who does not hold a lawful franchise, and he would have a right to enjoin the competition by anyone who did not hold such a franchise.*"

previously encouraged, by creating competition.

The state of Massachusetts, having granted a franchise to the Charles River Bridge Company, thereafter granted a franchise to another bridge company, the Warren Bridge Company, to build a bridge across the same stream in close proximity to and in competition with the former bridge. The new bridge was not only to compete, but its competition was in time to be intensified, for it was to cease charging tolls after some years and be operated as a free bridge. The first bridge company clearly would find its business impaired and finally destroyed by this competition of a free bridge, and the issue in the case was whether there was an implied condition of the original franchise that the state granting it would do no act to impair its enjoyment. If there was such an implied condition, the granting of the competing franchise would clearly be a violation of the contract, and void under the Tenth Section of the Constitution.

THE case was argued twice by the ablest members of the bar at that time, first in 1831 and again in 1837. During the six years' interval between arguments occurred one of the bitterest attacks ever made upon the Supreme Court, led by Andrew Jackson, asserting the court was encroaching on the prerogatives of the executive, and joined in by Georgia and other states, claiming similar encroachments on the states' prerogatives as sovereigns. The second argument extended over approximately nine days. The opinion was written by Chief Justice Taney, construing the statute in favor of the act of the state of Massachusetts in granting a second franchise and against the holder of the earlier franchise.

This case decided that there was no implied condition of the franchise contract to restrain the state from granting competing franchises, and that the holder of the earlier franchise had no right to be free from competition thus lawfully permitted by the state. It did not hold that the owner of the franchise was not entitled to protection from competition not lawfully authorized by the state. It held that the state could grant two valid franchises, in competition with each other. It did not hold that one who held an invalid franchise could destroy the business done under a valid franchise.

THERE was a powerful dissenting opinion by Mr. Justice Story (which, in all probability, would have been the prevailing opinion in 1831, at the time of the first argument of the case), who held that the holder of the first franchise had a legal right to be free from unlawful competition, and that there was an implied condition in the franchise contract that the state, which granted it, would do nothing to destroy its value by creating a competing condition during its term. Story felt strongly that his own state of Massachusetts was guilty of a mean act in destroying capital investment which it had previously induced and encouraged. His opinion was a very erudite one, in the course of which he used a famous quotation from Paston, Judge, who, five hundred years ago, in the reign of Henry VI[3] said:

> If I have a market or a fair on a particular day, and another sets up a market or fair on the same day, in a *ville* which is near to my market, so that my market or my fair

[3] 22 Henry VI, 14-b.

Damage through Misapplied Tax

"A TAXPAYER *who contributes his tax to a particular fund, which is being misapplied, suffers a special damage, and, regardless of whether his contribution is large or small, he should have a right to resort to the courts to test the legality of the action of officials in so misapplying the fund. On the other hand, a taxpayer who did not contribute to the fund, but contributed to some other fund, would not have any right, in logic or in law, to test the validity of such action on the part of government officials.*"

is impaired, I shall have against him an assize of nuisance, or an action on the case.

And again:

If I have an ancient ferry in a *ville*, and another sets up another ferry upon the same river, near to my ferry, so that the profits of my ferry are impaired, I shall have an action on the case against him.

THERE are numerous cases which have held that the holder of a franchise, even though it may not be exclusive, has a right to be protected from competition by all except those who hold a lawful and valid franchise covering the competing territory, and the Warren River Bridge Case has been cited as recognizing that doctrine.

Mr. Justice Butler cites the leading case on this subject, and it is hard to distinguish or reconcile that case, which was decided by the United States Supreme Court in 1928, with the TVA Case, nor does the prevailing opinion attempt such distinction or reconciliation.

In Frost *v.* Oklahoma Corporation Commission,[4] and Oklahoma statute came before the court under the Fourteenth Amendment which made cotton gins public utilities and required certificates of convenience and necessity before they could be set up and operated. There was a distinction made in the statute. Under certain conditions a certificate could be granted without a public hearing or a determination of convenience and necessity. The plaintiff held a certificate of convenience and necessity granted under this statute, and he sought to enjoin the Oklahoma Corporation Commission from issuing a certificate to compete with him on the ground that the provision in the statute which permitted such issuance without establishing public necessity therefor after public hearing was void because it was an illegal discrimination against

[4] *Supra.*

the complainant and others who had to establish such necessity. Oklahoma challenged the right of the plaintiff to maintain the suit on the ground that he did not have any legal right to be protected from competition, and, therefore, did not present a justiciable case to the court.

MR. Justice Sutherland wrote the opinion, and said:

> Appellant, having complied with all the provisions of the statute, acquired a right to operate a gin in the city of Durant by valid grant from the state acting through the corporation commission. While the right thus acquired does not preclude the state from making similar valid grants to others, it is, nevertheless, exclusive against any person attempting to operate a gin without obtaining a permit, or *what amounts to the same thing,* against one who attempts to do so under a void permit; in either of which events the owner may resort to a court of equity to restrain the illegal operation upon the ground that such operation is an injurious invasion of his property rights. 6 Pom. Eq. Jur. 3rd Ed. (2 Equit. Remedies) §§ 583, 584; People's Transit Co. *v.* Henshaw (1927) 20 F. (2d) 87, 90; Bartlesville Electric Light & P. Co. *v.* Bartlesville Interurban R. Co. (1910) 26 Okla. 453, 109 Pac. 228; Patterson *v.* Wollmann (1896) 5 N.D. 608, 611, 67 N.W. 1040; Millville Gas Light Co. *v.* Vineland Light & P. Co. (1906) 72 N.J. Eq. 305, 307, 65 Atl. 504.
>
> The injury threatened by such an invasion is the *impairment of the owners' business,* for which there is no adequate remedy at law. (Italics supplied.)

IT has been widespread belief among corporate lawyers that a franchise, even though not exclusive, was property, and that competition, by one who did not have a valid license, which destroyed this property was illegal. This belief rested, not merely on Frost *v.* Oklahoma Corporation Commission, but on a great number of other cases.

Even without a franchise, the owner of an established business has a right to be protected in the conduct of that business from illegal acts which would destroy its value and prevent him from following his legitimate calling. This principle was expounded in commonsense language by Justice Brandeis in the case of Dorchy *v.* Kansas,[5] sustaining the Kansas statute prohibiting sympathetic strikes in the mining industry. In that case Justice Brandeis said:

> The right to carry on business—be it called liberty or property—has value. To interfere with this right without just cause is unlawful.

Justice Brandeis was not interested in quibbling over whether the right to conduct an established business was property or liberty. He was not interested in any fine hair-splitting distinctions. The fact that the mine operator had a lawfully established business was sufficient to entitle him to the protection of the statute.

Would he have held that because a business was not an exclusive business, the owner thereof could not attack the constitutionality of a statute which purported to give someone a right to interfere with it and destroy it? Let it be conceded that a shopkeeper in Oklahoma might have too remote an interest in a sit-down strike in a New York factory to bring a suit to test the constitutionality of a statute which permitted such strike; nevertheless, if the strike was in his own shop, would he have to show that his business was a monopoly before he could attack the legality of a statute which permitted its destruction?

IS the broad rule that wherever conduct of officials in compliance with a statute "inflicts upon complainants direct and special injury of great consequence" the constitutionality of the

[5] (1926) 272 U.S. 306, 311, 71 L. ed. 248.

statute may be challenged by the suit of the person so injured, to be whittled away by confining it to particular enumerated cases?

The prevailing opinion concedes that the rule applies to "one of property, one arising out of contract, one protected against a tortious invasion, or one founded on a statute which confers a privilege."

Is it beyond the powers of the court to take these particular cases thus enumerated and derive from them the general principle applicable and common to all of them, or is the court going to cut down the general principle to the particulars and thus gradually destroy it?

IT is not necessary to contend that a shop conducting an ordinary business has a right to prevent competition by another shop conducting the same sort of business, because the latter is acting *ultra vires,* to justify the proposition that either of these shops has a right to prevent government officials, pretending to be acting as such, from engaging in business which destroys the value of their establishments. That is the kind of *ultra vires* conduct which is illegal, and to test the right and power of such officials all that ought to be necessary is to show a special damage to the complainant, separate and distinct from the common damage that all citizens would suffer by reason of such competitive acts.

A TAXPAYER who contributes his tax to a particular fund, which is being misapplied, suffers a special damage, and, regardless of whether his contribution is large or small, he should have a right to resort to the courts to test the legality of the action of officials in so misapplying the fund. On the other hand, a taxpayer who did not contribute to the fund, but contributed to some other fund, would not have any right, in logic or in law, to test the validity of such action on the part of government officials. The TVA Case introduces a fine distinction between limited privileges and exclusive privileges conferred by statute, and decidedly limits the development of the law which had progressed to a point where the courts were recognizing the right of any citizen to challenge an unlawful act of a government official whereby he suffered a particular damage to his person or property without the necessity of showing a direct trespass.

Interference with an *exclusive* franchise would ordinarily be unlawful, regardless of the constitutionality of the statute purporting to permit it. The distinction between limited and exclusive franchises would prevent the examination of a constitutional question in either case.

This fine distinction recognized by the prevailing opinion in the TVA Case is difficult to sustain except through the hair-splitting logic, which courts, mindful of the political consequence of

¶ "THE *TVA Case . . . may be added to those comparatively few cases in which the Supreme Court of the United States has avoided passing on the merits of a constitutional question which might lead to clashes between coördinate departments of the Federal government.*"

their decisions, indulge in to evade passing on whether government enterprises are encroachments on constitutional limitations or not.

THE TVA Case, therefore, may be added to those comparatively few cases in which the Supreme Court of the United States has avoided passing on the merits of a constitutional question which might lead to clashes between coördinate departments of the Federal government. By invoking the technicality that a property injury through competition with an established business does not present a legal wrong, which can be redressed in the courts, it enabled the government of the United States to avoid submitting to a scientific and judicial investigation the question of whether its action in establishing the Tennessee valley enterprise was a subterfuge and evasion of the Constitution.

The court has also thrown doubt upon the value of property, because there is no property unless the courts protect it. If good will, public service, and a well-established business as a going concern will not be protected by the courts from interference by government officials acting illegally, a large part of the value of all private business everywhere is jeopardized. The decision, therefore, is clearly not one which rings like a clarion call in the law but one of those unfortunate decisions which will give rise in the future to fine distinctions and a luxuriant growth of technicalities.

A Proposal for National Fiscal Control

"THE *Executive has always assumed the responsibility for coördinating an entire program and presenting a balanced budget, and Congress has been the body favoring expansion. Now that we have an Executive who does not assume that responsibility, it might be possible to set up a small committee in Congress to consider the whole fiscal policy of the government and restrain extravagance.*

"But there is no assurance today that such a committee could command the support of a majority of Congress. But unless we are prepared to wreck the United States, we must find some one to say to the people and to Congress that the government has certain limitations beyond which it cannot tax without choking all industry, and that the expenditures must be brought within that limitation."

—ROBERT A. TAFT,
U. S. Senator from Ohio.

Wire and Wireless Communication

It begins to look as though the Federal Communications Commission will be "saved by the gong" for the second successive session of Congress from the long threatened congressional investigation. Hope of any definite statutory reorganization of the commission by the present session had already been abandoned for the last couple of months. Yet the FCC critics, especially those in the House, were hoping for some opportunity to break through with one of the several resolutions which are lying around in both houses of Congress.

But the recent action of the Senate in approving the urgent deficiency bill, which includes an appropriation of $1,838,175 for the fiscal year 1940, seems likely to ring down the curtain on any further FCC action in Congress for the rest of the session. Congress is much too busy with more pressing affairs, aside from the increasing pressure to hasten adjournment. It had been thought likely until the very last minute that some of the Representatives who have been sniping at the FCC might make an attempt to tie a can on the tail of the appropriation bill in the form of an investigation rider. But this sentiment petered out into a very mild renewal of criticism on the floor by the anti-FCC members, led by Representative Wigglesworth, Republican of Massachusetts. Probably the knowledge that the Senate, which is on the whole more favorable to the FCC, would vote down any investigation rider, even if it were approved by the House, deterred the maneuver.

There is still the possibility that the House Rules Committee, under the domination of Representative Cox, Democrat of Georgia, may allow an eleventh hour rule for the vote on one of the investigation resolutions. If this were granted, and if the resolution were confined to a House probe, it might stand a pretty good chance of approval. But the hourglass is operating strongly in favor of the commission; and much as some of the House members would like to investigate the FCC, there just doesn't seem to be enough time left to bother with it.

The filing of the final report on the special telephone investigation cut some of the ground from under the FCC opposition in Congress (which must now more or less confine its criticism to the FCC regulation of radio). If the final report had been nearly as drastic in its recommendations against the telephone industry, as had been threatened in the preliminary report sponsored by Commissioner Walker, members who are friendly toward the telephone industry (of whom there are quite a number in Congress) would have indignantly joined in the chorus of those who have been howling for the FCC's head on a silver platter.

But the final report, as is well known now, surprised nearly everyone in Washington, not only by its moderation, but by the fact that it was unanimously agreed to by the full commission. The idea that there was probably an explanatory connection between these two sur-

prises didn't bother the Congressmen. The general reaction on Capitol Hill was that the commission, as far as the telephone investigation was concerned, had smartly gotten itself out of a tight hole.

Whether this impression will remain when the FCC presses for action on its telephone recommendations at the next session is a question which cannot even be guessed at this early in the game.

In other directions as well the FCC shows evidence of attempting to take advantage of its latest reprieve to consolidate its position. After bungling the international radio broadcast regulation by attempting to jam it through without hearing (thereby raising the cry of censorship), the commission back-tracked to the extent of setting the matter down for public hearing. Even here it was necessary to correct a procedural blunder by changing the date of the hearing from July 12th to July 14th. The original date by accident or design would have come right in the middle of the annual convention of the National Association of Broadcasters.

Two other recent occurrences helped to clear the atmosphere for the FCC in the matter of radio regulation. First of all, the commission extended for the period of one year the interim for radio broadcasting license renewal. This will not by any means satisfy the National Association of Broadcasters and other radio interests who have been complaining so loudly about the 6-month license renewal period which prevailed up to date.

The radio people have been agitating for a 3-year license on ground that any shorter renewal interim burdens the industry with financial uncertainty, unnecessary and expensive regulatory procedure, and the danger of indirect censorship or political coercion. The new 1-year rule certainly won't meet all those objections, but it should go a long way towards softening the opposition.

ANOTHER break for the FCC—not unexpected in legal circles—was the decision of the U. S. Court of Appeals for the District of Columbia upholding the FCC's elimination of the so-called "superpower" station—WLW. The commission had ordered this station, which is owned by the Crosley Corporation and operated at Cincinnati, Ohio, to cut down its unique broadcasting strength from 500,000 watts to the level of other first-class stations throughout the country—50,000 watts.

There was also some evidence that the FCC would attempt to work out in conference the controversial issue of newspaper control of radio stations. This was seen in the action by the commission in setting the troublesome Allentown Case (which involves the newspaper control issue) for executive hearings instead of local public hearings, as had been expected. It was thought that a compromise of some sort may be in the process.

Finally, the FCC on June 27th adopted a report of the television committee, headed by Commissioner Craven. This is generally regarded as a cautious yet far-reaching declaration of policy towards the new television art which threatens, in its day, to develop more regulatory complications than even sound radio broadcasting, if that were possible.

In view of all this diligent but unobtrusive effort by the commission to set its affairs in better order by settling or disposing of various points of criticism in connection with its work, the question naturally arises whether it will ultimately survive during 1940 and thereafter without statutory change or congressional investigation. Some Washington observers are not convinced. They feel that the FCC can be good just so long and then it is bound to get into hot water all over again.

On the other hand, 1940 is a political year and tinkering with the FCC is not without political danger. And so unless the FCC does run afoul of fresh trouble before the next session of Congress, it is quite likely that Congress would be just as glad to skip further action on this subject until after the election.

OVER the long range, of course, much depends on the turn of the political wheel in the aforesaid elections of 1940.

A decisive Republican victory would make the FCC a tempting target (among other objects) marked for political reprisal against the New Deal.

Another landslide victory for the 100 per cent New Dealers, however (with or without the coincidence of a third term for President Roosevelt), would be almost sure to revive a desire of the Corcoran-Cohen inner circle to eliminate this rebellious and embarrassing agency and make it over more to the liking of the New Deal inner circle. Such was the purport of the Wheeler (3-man ripper) bill introduced at this session, which the administration had to scuttle for political expediency. The bill has been abandoned but not forgotten.

Summing up, the best chance for the FCC, as presently constituted, to survive to any age at all (comparable with other Federal commissions) would appear to lie in a rather close election in the fall of 1940, with the balance of political power sufficiently scattered to allow the FCC to continue its progress down the middle of the road.

Such long-range speculation was stirred by the recent reappointment of Commissioner Walker to succeed himself for a term of seven years. The speculation was as to whether the job would last for another seven years. The impression at Washington is about 50-50. At any rate, the Senate, without opposition, confirmed Commissioner Walker's new 7-year appointment for what it was worth. This was seen as another result of the recent filing of the relatively mild and unanimous report on the special telephone investigation. The final report probably dissolved any of the criticism which might have lingered from the filing of, in April of last year, the Proposed Report sponsored by Commissioner Walker.

* * * *

FOR the first time, a unit of the independent telephone industry felt the sting of the National Labor Relations Board's regulation. On June 22nd the NLRB ordered the Commonwealth Telephone Company, which serves small communities adjacent to Madison, Wis., to stop discouraging its employees from joining the International Brotherhood of Electrical Workers (AFL). The order also required the telephone company to reinstate with back pay two employees discharged for union activities.

The NLRB found that during April, 1937, the company interfered with the "spontaneous effort among the men (at Wausau) to form a labor organization," among other things, by "interrogating employees about their organizational activities; by threatening them in that connection; by making disparaging anti-union statements to employees regarding their organizational and concerted activities for mutual aid and protection, and those therein engaged; by preventing the rendering of the assistance of others to its employees in these activities; (and) by attempting to dissuade and caution a strong union adherent about his engaging in organizational activities. . . ."

The board stated that it was "clear that commencing with the first organizational meeting of the employees in April and continuing thereafter the respondent through its Wausau officials, Pollock, Moore, and others, embarked upon a course of conduct designed to combat" the union's organizing efforts.

Theodore Siplon, acting line crew foreman, and active in the effort to organize the company's employees into a local of the AFL union, the board found, was discharged on August 31, 1937, in order to discourage membership in the AFL union. The board also found that Walter Seidler, skilled trouble shooter, was discharged on September 4, 1937, for refusal to comply with the company's transfer order removing him from Wausau to Two Rivers. Seidler was temporary president of the AFL group.

The transfer of Seidler and his consequent discharge, like the termination of Siplon's employment a few days earlier, the board held to be "rooted in the respondent's intent and desire to destroy unionization at Wausau."

* * * *

LITTLE of interest occurred in the FCC during the last half of June as a matter of telephone routine. The com-

mission announced that a formal hearing would be held on September 18th to determine the question of whether the Southwestern Bell Telephone Company would submit to jurisdiction of the FCC with respect to charging interstate zone rates connecting through its Kansas City exchange. The jurisdictional question is a debatable one and the state commissions of Kansas and Missouri will probably participate in an attempt to clarify the point.

Another interesting but minor development was the receipt by the FCC of a formal complaint from the Washington State Department of Public Service for a determination by the FCC of the reasonableness of interstate rates of the Pacific Telephone & Telegraph Company. The Washington commission is now in the process of a statewide telephone investigation authorized by the recent session of the state legislature. A special investigation is to be conducted under the counselship of Carl I. Wheat, who occupied a similar post with the FCC during its special telephone investigation.

* * * *

SINCE last December, the *St. Louis Post-Dispatch* has been publishing a radio edition via the facsimile process. Every day, beginning at 2 p.m., the *Post-Dispatch* facsimile is transmitted over Station W9XYZ (operating on a frequency of 31,600 kilocycles). This experimental edition was received by a number of facsimile receiving sets satisfactorily in an area of from 30 to 50 miles from the transmitting tower in St. Louis.

Robert L. Coe, of the *St. Louis Post-Dispatch* staff, recently wrote a brief report on the seven months' experiment with facsimile transmission for the *Editor & Publisher* (the issue of June 10th). Mr. Coe stated:

> Our present experimental program has two main objectives: (1) To determine whether the equipment now available is suitable for the establishment of a facsimile broadcast service; (2) to ascertain the public's reaction to facsimile broadcasting in an attempt to determine the potential audience when and if suitable equipment is available.

The St. Louis newspaper made an effort to place facsimile receivers in as many public places as possible where the greatest number of people could see the receivers in operation and learn something of their capability. They were placed in department stores, hotel lobbies, business offices, etc.

The radio edition of the *St. Louis Post-Dispatch* consists of 9 pages, including general news, sports, pictures, and editorial page with a political cartoon. Each page is four standard newspaper columns in width, using the regular 7-point type employed in the mother edition.

While quite satisfied with the results obtained, Mr. Coe injected a couple of critical notes. First of all, the size of the edition seems to be a little too small (8½ by 9½ inches). He thought that the facsimile would be improved if they could utilize both sides of the paper instead of one side as present practice necessitates.

Most important, however, was Mr. Coe's statement that "facsimile service, to enjoy wide public acceptance, must have considerably greater speed than that which the present equipment is capable of." He concluded that while more remotely located rural areas may have to depend on this type of service to receive their news, facsimile service generally must offer 24-hour news service to get anything approaching a complete newspaper into the home by way of the air waves.

* * * *

ST. PAUL, Minn., creditors may garnish telephone refunds due their debtors, but only after the Tri-State Telephone & Telegraph Company has deducted whatever it may be owed for past services, Judge Gustavus Loevinger held in Ramsey district court. Debtors may not have refunds applied on future phone bills.

His ruling followed a hearing held June 19th on petition of counsel for the telephone company, who stated the company had been served with more than 1,300 garnishments, attachments, and executions of judgment and asked that they be informed how to proceed.

Financial News and Comment

By OWEN ELY

TVA's Wings to Be Clipped?

CONGRESSIONAL conferees on the TVA amendment bill remain deadlocked (at this writing) on the various proposals made by House and Senate members. Representative May's proposal to advance only $45,000,000 (instead of $100,000,000), which would cover TVA's commitment with Commonwealth (the remaining $33,600,000 being supplied by municipalities) was rejected by Senator Norris. The Senator held that the funds were insufficient and that they were below the smallest amount authorized in either House bill, therefore subject to a point of order. He then proposed that $65,000,000 be authorized, with the limitation that the proceeds could be used only to consummate the present deal and to integrate and rehabilitate the properties to be purchased.

Representative May, chairman of the Conference Committee, in a special statement indicated that the $65,000,000 figure might have been acceptable if Senate conferees had agreed to a new provision stating that it is not the purpose of Congress to adopt a policy of government ownership. He added:

> In other words, the vital question which bars agreement . . . . is the issue of permitting the Federal government to establish an industrial empire of public utilities, competitive with privately owned utilities and covering seven or eight southern states, which empire would ultimately result in state socialism on a national scale. The TVA is the instrument which the state socialists would use to accomplish their ends, and the inevitable result would be complete destruction of large tax-paying industries and the addition of hundreds of thousands of railroad employees, coal miners, and other industrial workers to the bread lines. . . .
>
> Mr. Sparkman and the TVA directors prate about a sum necessary, in addition to the purchase price of the properties of the Tennessee Electric Power Company, for integration, rehabilitation, and the like. As a matter of fact, the properties are in excellent condition, and no substantial expense for integration will be necessary. However, I would refer the TVA officials to the document which they filed with the subcommittee . . . and call their attention to an excerpt from their own words under the heading "Justification of Estimate for 1940." They say that in the event the properties of the Tennessee Electric Power Company are acquired they will need about $7,000,000 "to interconnect the acquired properties with the present system of the authority." . . . To allow more for such purposes would be criminal liberality with an empty treasury. . . .
>
> The TVA operations so far have already practically reduced more than a score of counties along the Tennessee river in Tennessee, Alabama, and Georgia to insolvency by submerging the most valuable lands in the valley to the extent of hundreds of thousands of acres. When Gilbertsville dam is completed, many more counties will face the same fate and when the tax-paying utilities are taken out of taxation, there will be a general repudiation of bonded and other county and municipal indebtedness throughout the valley—a tragic picture.

Representative Sparkman of Alabama, a member of the House Military Affairs Committee but not a member of the Conference Committee, made a statement criticizing Chairman May. He referred to the Tennessee Electric properties as "badly in need of rehabilitation" and also stressed the desirability of buying additional facilities in north Alabama and North Mississippi, "which no one can deny lie in territory logically to be served by the TVA." TVA Director Lilienthal believed a new contract could be enacted by about the middle of July, if city officials could wait.

(See news item page 112.)

Columbia Gas & Electric

COLUMBIA Gas & Electric Corporation's plan to drop its affiliate, Columbia Oil & Gasoline, thus relinquishing control over Panhandle Eastern Pipe Line Company, was submitted to the district court of Wilmington, Del., on June 20th. The plan will require approval by the court, the Department of Justice, and the SEC. Columbia Oil will transfer to Columbia Gas all its physical properties in return for which the former will return to the latter its 400,000 shares of preferred stock. Properties to be thus transferred are the Preston Oil Company, the Viking Distributing Company, Virginian Gasoline & Oil Company, the Union Oil & Gasoline Company, and the Ohio Fuel Supply Company.

Columbia Oil will endeavor to sell in the open market (to purchasers having no connection or interest in Columbia Gas) the $10,000,000 Class A preferred stock of Panhandle Eastern which it now holds, or to have it refunded by Panhandle Eastern, the cash proceeds being applied to reduction of the $21,000,000 debt of Columbia Oil to Columbia Gas (20-year debentures). When such reduction by $10,000,000 has been effected, the interest rate on the remainder will be reduced to 3 per cent and such debentures will eventually be retired through sinking-fund payments of $600,000 a year.

All officers and directors of Columbia Oil will resign and be replaced by new men acceptable to the Department of Justice, assuming that the plan is approved by the department and by the SEC. The new directorate (six in number) will also serve on the board of Panhandle Eastern, with the remaining three directors elected as representatives of Missouri-Kansas Pipe Line Company. Charles A. Munroe, president of Columbia Oil for several years, has already resigned as top executive of that company.

Columbia Gas will offer to sell Michigan Gas Transmission Company (and also Indiana Pipe Line) to Panhandle Eastern, within a year after approval of the plan, at not less than its investment therein or any better offer which Columbia may receive. However, if Panhandle Eastern does not exercise its right to buy the Michigan Company, Columbia can, after due notice to Panhandle, dispose of the property elsewhere, provided the new owners have no connection with Columbia.

With regard to the remaining debt of Columbia Oil to Columbia Gas (pending its retirement through sinking fund payments), Columbia Gas agrees that any default by Columbia Oil in such debt retirement will not permit the former to obtain control of Panhandle through execution of any judgment.

Columbia Oil now has withdrawn its objection to the plan for distributing warrants for 80,000 shares of Panhandle to Mokan shareholders and the court has ordered such distribution made. It is understood that Panhandle will promptly register the issue with the SEC. There are 1,569,807 shares of Missouri-Kansas in the hands of the public and about 780,027 Class B shares. As soon as the plan is effective, shareholders will have forty-five days to present their certificates for stamping, following which the 80,000 warrants will be allocated on a pro rata fractional basis (excepting that Missouri-Kansas Class B stock will participate on the basis of each 20 shares being the equivalent of one share of A stock). The warrants will run forty-five days following issuance, the subscription price of the new Panhandle Eastern stock being $25 a share.

Price-earnings Ratios

UTILITY stock prices of soundly capitalized companies are closely related to the percentage of gross revenues available for common stock, according to a study prepared by the research department of Stone & Webster, Inc. The new "yardstick" for stock values indicates that operating company shares usually sell on a higher scale than holding company issues, due to the fact that the percentage of revenue available for

dividends fixes the margin of protection against adverse developments. On December 31, 1938, the common stocks of 28 representative operating utilities (principally in the electric business) had an average 18 per cent of 1938 revenues available for dividends, and the prices of these stocks averaged about 12.9 times the share earnings. On the other hand, four common stocks of another group of utilities which had less than 10 per cent of revenues available were appraised in the market at only 8.3 times share earnings.

Ten years ago, before the depression, utility stocks displayed the same general characteristics, although the greater expectation of growth prospects, etc., resulted in larger average price-earnings ratios. Thus on December 31, 1928, a group of 23 companies which had 21.8 per cent of revenues available sold at an average price-earnings ratio of 20.1, while 9 companies reporting an average of only 16.7 per cent of revenues available were quoted in the market at 17.6 times earnings. Two companies which carried nearly one-third of gross down to net, were valued at 25.5 times the share earnings.

New York City Bids for Interborough System

NEW York city has made a "final" offer of $151,000,000 for all properties of the Interborough Rapid Transit Company and the Manhattan Railway Company. Spokesmen for committees representing the senior securities of the two companies have approved the offer. This brings the gross price to be paid by the city for all traction properties to $326,000,000, which is $110,000,000 lower than the price named in the Seabury-Berle plan, although the latter did not include B.-M. T. street car and bus lines. The earlier plan, however, provided for payment in bonds which would not have enjoyed as high a market rating as the regular New York city bonds now offered.

Interborough securities advanced sharply on news of the plan, but reacted later. The present price of $151,000,000 is based on an offer of 82½ for Interborough first 5s and Manhattan first 4s, and 87½ for Interborough 7 per cent secured notes. These three issues are currently selling around 55-8. No offer has been made with respect to other securities, but an agreement is expected to be reached soon for allocation of part of the purchase price to junior security holders.

The present aggregate price for the two traction systems is slightly in excess of the $315,000,000 limited increase allowed in the city's debt limit, but Mayor LaGuardia has indicated that a method would be found to finance the $11,000,000 excess. The city's contract for purchase of the B.-M. T. system was signed June 30th, but must still be ratified by 90 per cent of the bondholders and two-thirds of the stockholders.

New Financing

IN the fortnight ended July 1st utility financing was actively resumed, with the following issues successfully marketed:

$14,750,000 Central Illinois Electric & Gas 1st 3¾s, due 1964, at 100¼.

$3,000,000 Central Illinois Electric & Gas serial deb. 3s, 3½s and 4s, due 1939-49 to yield .75—4.00%.

$8,323,000 Rochester Gas & Electric general 3½s, due 1969, at 105½.

$27,300,000 Gulf States Utilities 3½s, due 1969, at 106¾.

$22,000,000 Washington Water Power 3½s, due 1964, at 105.

$13,000,000 New York State Electric & Gas Corp. first 3¾s, due 1964, at 102.

60,000 shares New York State Electric & Gas Corp. 5¼% preferred stock at 100.

The last week of June marked one of the most active periods of the year in the investment market, and successful flotation of the Gulf States Utilities, Washington Water Power, New York State Electric & Gas, and Bethlehem Steel issues—together with the usual quota of municipal offerings—was a tribute to the courage of investment bankers during a period when stock prices were declining

and war clouds again gathering on the horizon. However, it may also be mentioned that this accumulation of new issues at a time when new financing might be expected to be at low ebb was probably due in part to the SEC 20-day required delay following registration. Had recent developments both at Washington and abroad been foreseen at the time of registration, it seems doubtful whether such a large volume of financing would have been scheduled currently.

The successful flotation of the New York State Electric & Gas Corporation bonds and preferred stock was particularly interesting in view of the recent adverse comment by the chairman of the public service commission regarding proposed accounting changes by the company (referred to elsewhere).

As indicated in the chart on page 101, utility refunding for the first half of 1939 has averaged close to the 1938 level, but new capital issues have been negligible. June financing exceeded the May figure by a slight margin.

West Penn Power Company (American Water Works & Electric system) filed application with the SEC for the sale of 297,077 shares of 4½ per cent preferred stock, proceeds of which will be used to retire the 7 per cent and 6 per cent issues, at a substantial saving in dividend requirements.

AMERICAN Gas and Electric Company is reported considering a preferred stock refinancing program for its operating subsidiaries, which may aggregate $80,000,000.

New York & Richmond Gas is considering the sale of 3 per cent notes to banks, to retire $2,125,000 refunding 6s due 1951.

The SEC has authorized Indiana & Michigan Electric Company to issue about $26,500,000 new securities for a refinancing program. The company plans to sell $22,500,000 first 3¼s to a group of insurance companies at 103 and a 10-year 2⅜ per cent promissory note to the Bankers Trust Co. of New York, and to issue about 150,000 shares of common stock to its parent, the American Gas and Electric Company. The commission's approval was conditioned upon payment of common stock dividends in stock instead of cash, unless earnings reached a certain level.

Southern California Edison has arranged for the private sale of $30,000,000 25-year bonds to a group of five insurance companies for refunding purposes. It is reported that the coupon rate will be 3¼ per cent, but other details are not yet available. The issue is subject to approval by the California Railroad Commission.

Kansas Power Company (Middle West system) has registered with the SEC $5,000,000 first 4s, due 1964; Harris, Hall & Co. will head the underwriting group.

Southern Bell Telephone & Telegraph Company on June 29th registered with the SEC $25,000,000 40-year 3 per cent debentures of which $22,500,000 are to be offered publicly, the remainder being sold to the system pension fund. Proceeds will be used largely to refund advances made by American Telephone and Telegraph Company, and to increase working capital.

Kansas Power & Light Company (North American system) filed application with the SEC for an exemption from the necessity of filing a declaration in connection with the proposed issue and sale of $26,500,000 3¼ per cent first mortgage bonds due 1969, and $3,500,000 2¾ per cent promissory notes, maturing serially from 1940 to 1949.

Dakota Power Co. proposes to issue $675,000 first 4¼ per cent serial bonds, and $337,000 4 per cent unsecured notes due 1960. Most of the bonds will be sold to the Equitable Life Assurance Society, the remaining bonds and the note issue being sold to the parent company, General Public Utilities, Inc.

Associated Gas & Electric

ASSOCIATED Gas & Electric system has now obtained a full settlement of its case with the Federal government,

involving income taxes for a period of years beginning with 1927. An agreement was reached with the United States Treasury Department to settle $80,000,000 claims for $8,700,000. In connection with the recent registration and sale of $13,000,000 New York State Electric & Gas bonds and $6,000,000 preferred stock with the SEC, the commission suggested that $3,000,000 of the tax settlement be paid at once and the remainder at the rate of about $1,000,000 a year; and this arrangement has now been confirmed by the Treasury Department.

Chairman Maltbie of the New York Public Service Commission has criticized certain "financial operations and bookkeeping manipulations" of the New York State Electric & Gas Corporation. Mr. Maltbie held that the corporation had attempted to make its securities legal investments for savings banks in the state of New York. His criticism did not, however, interfere with the commission's approval of the financing plans. In reply to Mr. Maltbie, Associated Gas & Electric Corporation pointed out that certain reserves set aside for income tax deficiencies could now be considerably reduced, due to the pending Federal tax settlement; and also that he had ignored a special reserve of $7,242,488 which "in accordance with the approval of the public service commission was netted against the cost of fixed capital." However, the company decided not to make the proposed bookkeeping adjustments, in view of the objections raised. The commission will proceed with a further investigation to determine original cost, reasonable plant depreciation, etc.

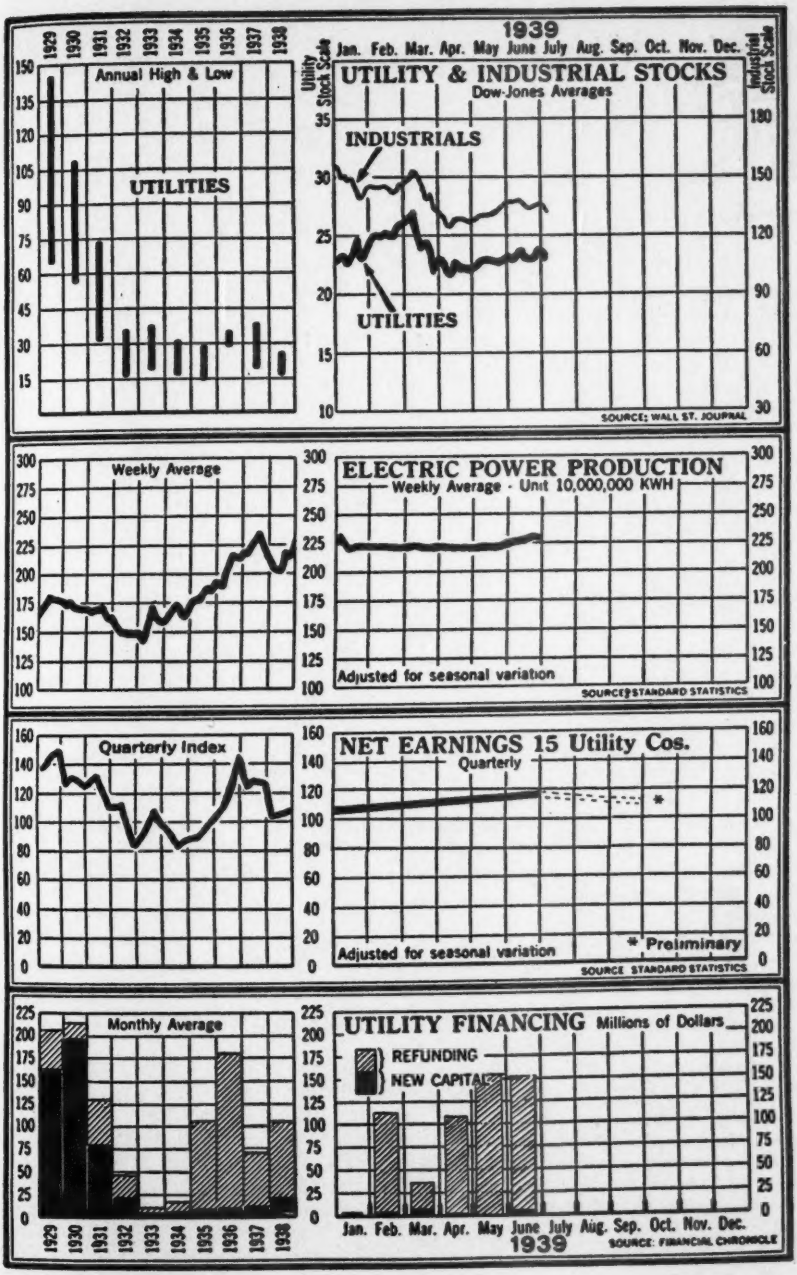
Recent negotiations between the Associated Gas interests and the Public Service Corporation of New Jersey for purchase of Jersey Central by the latter are, it is reported, now complicated by difficulties over the price. According to press reports, Associated Gas wishes to recover its original investment plus accrued interest and is asking for slightly more than $12,000,000, while Public Service is unwilling to pay more than $8-9,000,000. Associated Gas, through the New Jersey Power & Light Company, owns one-third of the outstanding common stock of Jersey Central Power & Light. The remaining two-thirds of the common stock is held as collateral behind the defaulted debentures of the National Public Service Corporation. Associated owns more than 95 per cent of these debentures.

Corporate News

AMERICAN Power & Light Company will not be forced to dispose of its controlling interest in the Nebraska Power Company of Omaha under the terms of the Utility Holding Company Act, according to President Aller. A resolution had been passed by the Central Nebraska Public Power District asserting that the company must be disposed of under the act, and urging that it be acquired either by the city of Omaha or by a power district. Mr. Aller added that American Power & Light had no desire to dispose of Nebraska Power unless a plan for such sale should be endorsed by the citizens of Omaha and other communities served.

Vice President Harry R. Woodrow of Consolidated Edison Company has presented figures to the public service commission estimating kilowatt demand by 1942 at about 1,880,000 kilowatts. Existing capacity, together with installations now under construction, is adequate to handle that load with a margin of 27 per cent.

Postal Telegraph & Cable Corporation's reorganization plan was given final approval by Judge Alfred C. Coxe on June 30th. The Postal system, which has been in the courts since 1935, will now be reëstablished as four new companies, as described in this department in the May 25th FORTNIGHTLY. Two appeals are being filed against the plan, one by an independent bondholders' group and the other by a labor organization. Both appeals are in connection with the make-up of the new directorate; it is unlikely that they will interfere with the plan.


Annual High & Low
1929 1930 1931 1932 1933 1934 1935 1936 1937 1938
UTILITIES
1939
Jan. Feb. Mar. Apr. May June July Aug. Sep. Oct. Nov. Dec.
UTILITY & INDUSTRIAL STOCKS
Dow-Jones Averages
INDUSTRIALS
UTILITIES
Utility Stock Scale
Industrial Stock Scale
SOURCE: WALL ST. JOURNAL
Weekly Average
ELECTRIC POWER PRODUCTION
Weekly Average - Unit 10,000,000 KWH
Adjusted for seasonal variation
SOURCE: STANDARD STATISTICS
Quarterly Index
NET EARNINGS 15 Utility Cos.
Quarterly
Adjusted for seasonal variation
* Preliminary
SOURCE: STANDARD STATISTICS
Monthly Average
UTILITY FINANCING Millions of Dollars
REFUNDING
NEW CAPITAL
1929 1930 1931 1932 1933 1934 1935 1936 1937 1938
Jan. Feb. Mar. Apr. May June July Aug. Sep. Oct. Nov. Dec.
1939
SOURCE: FINANCIAL CHRONICLE

What Others Think

The Gas Manufacturers Talk Things Over

THE New York World's Fair, with its many elaborate industrial exhibits, is providing a setting of unusual interest to the numerous business conventions which are being held this year in the metropolis. A few days before the recent seventh annual convention of the Edison Electric Institute, under such circumstances (reported in PUBLIC UTILITIES FORTNIGHTLY of June 22nd), there was another national meeting of utility interest. It was the three days' annual convention of the Association of Gas Appliance and Equipment Manufacturers.

An address of welcome was made to the delegates gathered at the "Court of Flame" theater of the Gas Industries' exhibit at the fair by Hugh H. Cuthrell, president of Gas Exhibits, Inc. He urged the delegates to capitalize on the "asset" which the gas exhibit at the fair represents by national, united efforts, and suggested a comparison with exhibits of other industries as a means for developing a constant, effective program for proving to America that the gas industry has equipment and fuel to provide superior public service in the World of Tomorrow as well as the World of Today. Mr. Cuthrell added:

> Mainly would I suggest that we develop to high degree the attitude of thinking and acting nationally and as a united industry. To follow such a procedure we will have to rid our minds of narrow and somewhat selfish concepts. We will have to regard ourselves as units in a national industry which is endeavoring to provide a superior service to the American public. We must learn that working together we have that service in our gas appliances and fuel. We have made a fine start by uniting to present an exhibit to the public here at the fair.

THE principal guest speaker at the morning session of the gas manufacturers meeting was Saul Cohn, president of the National Retail Dry Goods Association. He praised the gas appliance manufacturers for the improvements made in the design and construction of their products and for having "kept pace with modern trends and developments." He asked for more coöperative relation between the gas appliance industry and the retail dealers, adding that it would "definitely stimulate the market for gas appliances if the utility companies, producers, and retailers pull together and tell the story to the customer at the same time."

Mr. Cohn referred to the broader aspect of the industry's relationship with the general economic situation. He pointed out that there are four types of economy and emphasized that only one constituted a really constructive available market—"the economy of our own domestic consumption."

The speaker explained that "welfare economy," which includes the distribution of billions of dollars annually among unemployed, aged, youth, and other "temporary wards of government," has very little purchasing power. The third class he mentioned was the "export" economy which is tied into "diplomatic and state regulations because of current international unsettlement," and is not sufficient in volume to impress the whole nation as far as the production and sale of goods are concerned.

Finally, Mr. Cohn observed that the "economy of armament" is destructive in character and "does not put any money lastingly into the public till." Mr. Cohn concluded:

> We who are engaged in the making and selling of consumer goods have a special responsibility. We must do everything possible to make and sell consumer goods, not

only as businessmen, but as citizens having a social responsibility. We are the nerve center of the economy.

GEORGE E. Frazer, of Chicago, counsel for the association, told the meeting on its second day that gas appliance manufacturers "are in the full stream of governmental regulation." He pointed to more than eight specific legislative acts enforced by as many government agencies which tied the hands of manufacturers in their production of appliances. Mr. Frazer continued:

> Manufacturers are forced to meet increasing burdens of labor costs. Wages are not now determined by the manufacturer as an employer. The manufacturer suggests the wages he would like to pay. Under present governmental regulation the manufacturer literally does not know what bargain he may make with his individual employees or what the course of governmental review may turn out to be.
>
> The manufacturer is essential to the gas industry. Without improved appliances the volume of gas sold will suffer in competition with other fuels. We need bigger and better and richer manufacturers. Under the burden of regulation it is not improbable that we may have fewer and smaller and poorer manufacturers.

Another important guest speaker at the association meeting was U. S. Senator H. Styles Bridges of New Hampshire, well known in utility circles by reason of his former regulatory post as chairman of the New Hampshire Public Service Commission. Senator Bridges was critical of the effect of the administration's policies upon the business community generally, and stated his belief that individual initiative in industry has been "drugged into a coma by governmental policies."

He touched upon seven definite obstacles to industrial recovery: War scares; government spending and consequent debt; danger of inflation; punitive and inequitable taxes; the confusion of labor under the NLRB; overcentralization of relief; and government competition with business. If we correct these things, or start to correct them, the Senator added, we shall see a noticeable recovery in business. Senator Bridges concluded:

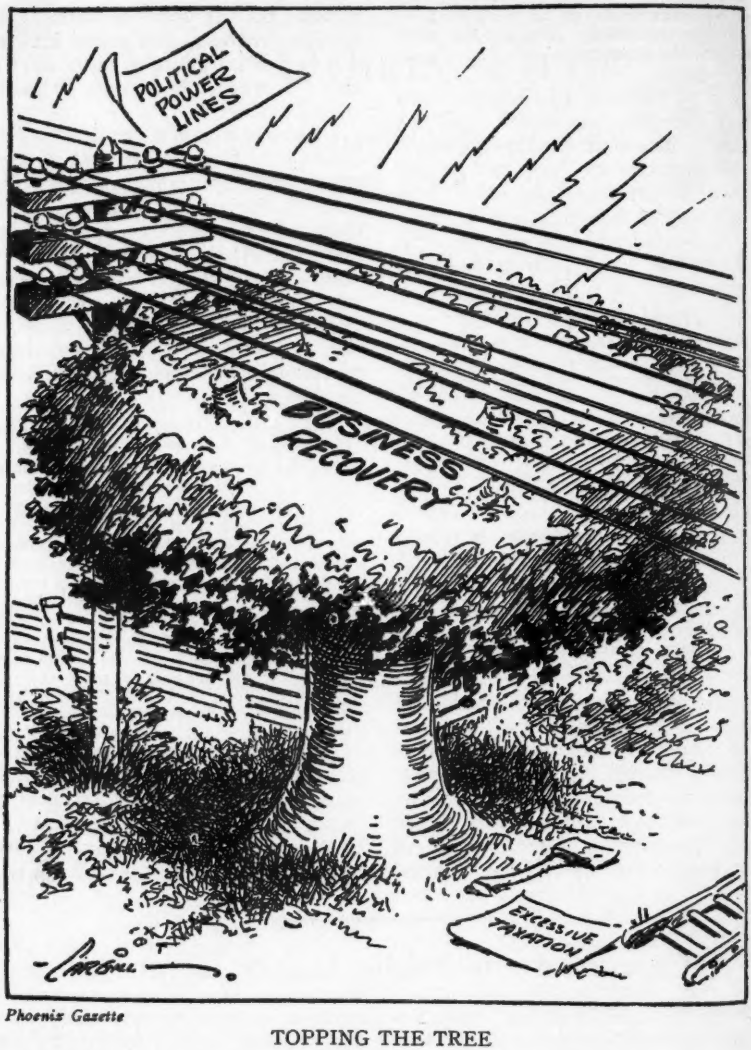
> The progress of this country depends so much upon the initiative of the individual that the American public must be made to realize that the present attitude of the government is dangerous to our fundamental existence. We must draw a line, here and now, to see that we have the necessary continued growth and remedial legislation to survive. We have gone through a period of falling values, increased and appalling unemployment, slackened initiative, and fanciful plans, with reform fighting recovery, in which, if our people are not to fall prey to the selfish and fanatic, we must have a national breathing spell so that we can find our true direction to progress.

Another guest speaker on the association program who urged the repeal of burdensome taxation on business was George V. McLaughlin, president of the Brooklyn Trust Company, and former police commissioner of New York city.

A Case Study in Public Utility Competition

STUDENTS of public utility regulation who are well grounded in the history of competitive utility operations in the United States often express wonder these days over the apparent revival (chiefly under the auspices of the public ownership movement) of the idea that such competition generally adopted might serve the public interest. Laurence R. Gray, associate professor of economics at the University of Arizona, made an interesting case study of this subject in an Arizona community with a population of about 10,000. The resulting case study was published in the May issue of *The Journal of Land & Public Utility Economics.*

Back in 1914, citizens of this community became dissatisfied with the service offered by the local electric utility company and complained to the state commission. Uncertain as to its



Phoenix Gazette

TOPPING THE TREE

authority to compel an established utility to improve its service, the commission finally decided to authorize competition and a new company entered the same field and a full-fledged power war developed in 1917.

Professor Gray reviewed the result in part as follows:

Inasmuch as changes in rates necessitated the commission's approval, there was no official record of persistent rate cutting. As a matter of fact, there was no change in the approved rate schedules until 1924. On the other hand, homes and business houses were wired free of charge, and it is said that fixtures were lent to customers who would agree to connect with the lender for a specified period of time. Many domestic

establishments were supposed to be receiving energy at "commercial" rates, and it is probable that no two of them paid the same rates. Duplicate distribution systems had been erected on most of the streets and alleys of the city. In the words of the commission: "Both companies immediately embarked upon a program of ruinous cutthroat activities which in the end resulted only in poor utility service and operating deficits." Discrimination became the rule rather than the exception.

Both companies were soon operating in the red. It was a protracted struggle, however, because the respective companies were backed by prominent local families with substantial resources. In time neither company could finance essential betterments for service. In August, 1918, both companies had asked for a 20 per cent increase in rates to meet operating deficits. Eventually there was an armistice and the two rivals consolidated. But the credit of the local business had already been so undermined that operation after the merger was unsuccessful and in 1928 the property was sold to other interests.

THE properties had deteriorated to the point where rehabilitation was necessary and there was "no other alternative other than to pay higher rates in the absence of excessive investment." Even the new company in 1930 became embarrassed and another reorganization was effected to scale down the capitalization of the parent concern. After reorganization, rate reductions were filed by the company when it found net revenues rising above an established maximum. Professor Gray continued:

> In the first few decades of public utility development, a great deal of faith was placed in competition. After many bitter and expensive experiences, it was realized that competition was no guaranty of an ample quantity of service at a reasonable cost to the consumers concerned. Undoubtedly there are good grounds for dissatisfaction with monopoly occupation of present-day communities. This is particularly true where commissions take no particular interest in initiating investigations into character of the service and reasonableness of rates. Naturally, the wise public utility management is deeply concerned with the problem of "favorable" public relations; but a good many are too complacent in their assurance that the public will put up with almost anything rather than face the disadvantages of competition.

Professor Gray added that there is danger of the public becoming so incensed over a careless attitude of local management that it will consider competition desirable as a punitive measure without realizing its eventual boomerang effect. He continued:

> In this particular instance, it would have been much more to the long-run advantage of both consumers and investors had the commission forced the original company to expand and improve its plant. The initial investment in plant and distribution system would have been somewhat less than the amount spent on two plants with the same aggregate capacity. Inasmuch as the initial investment is quite substantial, this saving in the requisite capital is important.
>
> An additional economy would have arisen out of the greater diversity of use. The mere fact that the customers of a single plant are increased in number would tend to reduce the likelihood of customers making their maximum demands simultaneously. Not only would this fact have necessitated an original investment of something less than twice the size of the two competing plants, but also the single plant would have had a smaller percentage of unutilized capacity for a larger part of the time.

Another extravagance arose out of the fact that operating expenses were larger than they would have been in the absence of competition. Aside from the fact that "the rather attractive landscape was spoiled by a wilderness of poles and wires," the author stated that the consumers undoubtedly suffered from excessive distribution costs.

PROFESSOR Gray concluded that, in view of this rather protracted bitter dispute, one would assume that consumers would exhaust every possible means of improvement before they would repeat the experience. However, a great many local consumers would today advocate that the municipality construct a new plant to compete with existing electric light and gas companies.

Of course, this case study of a small

community is hardly analogous to competitive situations in larger communities, such as Cleveland, Ohio, and Springfield, Ill., where public-private competition has been going on for a number of years without any unusual amount of friction. Even in the latter circumstance, however, it is important to note that public plants which were set up for purposes of competition soon discovered that monopoly isn't so bad after all, provided they can be the ones to enjoy it. Such has been the experience in Seattle and Los Angeles and only the vote of citizens prevented the noted "yardstick" municipal plant at Springfield, Ill., from buying out the facilities of its rival.

PUBLIC UTILITY COMPETITION: A CASE STUDY. By Laurence R. Gray. *The Journal of Land & Public Utility Economics.* May, 1939.

The Problem of Idle Men, Money, and Machines

IF business appeasement declarations from an administration spokesman are to be taken at anything approaching their value, the private electric executives have good reason to feel pleased or at least relieved by a recent address made before the Harvard Business School Alumni by Marriner S. Eccles, chairman of the board of governors of the Federal Reserve. Mr. Eccles, who has established something of a reputation as a high-priest of the "spending" school of economy, spoke on the problem of what to do with idle men, money, and machines. In the course of his discussion he reviewed a stock criticism usually made by business executives against New Deal policies. These, he said, in general call for: (1) removal of tax deterrents; (2) abandonment of unwise spending policies; (3) easing up on security regulation; (4) discontinuance of government competition with private enterprise.

It was in covering the fourth point that Mr. Eccles tossed an olive branch in the direction of the private electric industry. He stated:

> With reference to government's competing with private business, I have repeatedly contended that for the government to do so is a deterrent. Yet, let's look at this complaint realistically. When it is brought out of the realm of generality and reduced to specific terms, the complaint is confined almost entirely to the power industry.
>
> I agree that it is unwise public policy for the government to go into the utility field in competition with private capital. I recognize however, that some of the worst financial abuses occurred in this field in the twenties and that public revulsion demanded a house cleaning and a reduction of excessive rates that were imposed by many companies to support inflated financial structures. The threat of an extension of competition by the government and by various municipalities served to bring about a justifiable reduction in rates which was a big help to millions of consumers.
>
> With this accomplished and real progress being made in reducing the inflated capital structures to a sounder basis, there is no further justification for, or, so far as I know, intention of further government competition in this field. What was done to correct abuses in this area was also the result of an insistent public demand that was successful, notwithstanding the most insidious organized propaganda we have ever witnessed.

SPEAKING of the physical plant requirements of the electric power industry, Mr. Eccles pointed out that there was a generous margin of excess capacity until late in 1936. In that year capital expenditures of the power companies which had dwindled to almost nothing during the depression amounted to about a quarter billion and in 1937 had increased to $425,000,000. Mr. Eccles continued:

> If we can succeed in increasing national income and industrial activity, a further expansion of capital outlays for plant and equipment may reasonably be anticipated. Under the most favorable circumstances, however, such investment is not likely to exceed the $800,000,000 to $900,000,000 a year reached in the late twenties when the industry was experiencing the period of its

most rapid growth. That is, we cannot, at the outside, look for an annual expenditure of more than $400,000,000 above the 1937 level. Now, this additional outlay, desirable as it would be, would not make much of a dent on the billions of capital which need to be invested in new enterprise in order to reduce unemployment substantially.

I am convinced that in this industry, as in many others, including the railroads, we are dealing with what essentially are depression problems and that the difficulty is not so much that deterrents exist, at least to the extent so often alleged, but rather that we do not have adequate demand, at the present levels of national income, that would make profitable large new investments for additional output or services.

I have mentioned the major complaints as to supposed deterrents and expressed my personal views with reference to them, seeking to put them in correct perspective as I see them. It leads me to the conclusion that we must look much deeper into our economic structure today for the underlying forces that are holding back further recovery.

However, just to show how often Washington developments seem to move at cross purposes, *The Wall Street Journal* editorially commented on the fact that on the same day it had reported Chairman Eccles' address, it carried quite a different message under a Washington date line. The *Journal* stated:

> . . . a Washington despatch reported that the President had transmitted to Congress with his approval recommendations of the Board of Army Engineers that the Apalachicola, Chattahoochee, and Flint rivers in Georgia and Florida be "developed" for purposes of power and navigation. The power facilities would cost altogether some $53,000,000 and would yield an annual revenue of $6,556,000 from sales of power. The navigation facilities were estimated to cost about $16,000,000. The ultimate primary power to be produced would be 964.5 million kilowatt hours.
>
> In the course of his address, Mr. Eccles stated that he conceded the unwisdom of a policy of government competition with private industry but pointed out that in the case of the utilities the policy was the outgrowth of financial abuses and a public demand for "a house cleaning and a reduction of excessive rates."

APROPOS, however, of the solution of putting idle men and idle money back to work, a recent article in the widely read *Saturday Evening Post* emerged from the opposite quarter of the American politico-economic scene. This article was written by Wendell L. Willkie, the articulate president of The Commonwealth & Southern Corporation, whom some of the Washington newspaper men have nicknamed the "utility dynamo." Mr. Willkie's article is along the general line that investors are afraid to put available capital to work because of governmental restrictions. While this is hardly a new thought, Mr. Willkie's approach and development of it are quite unique. He summed up the investment and employment situation as follows:

> Government regulation, government competition, and government discouragement of investment are the three elements of the fear that dominates the business man and investor today.
>
> And if we balance up the books, where are we?
>
> 1—We still have those 11,000,000 unemployed—nobody can get away from the fact.
>
> 2—We have lying idle in the banks several billion dollars of money for investment.
>
> 3—We have a need for all that money, and more, to be spent for the capital expenditures of industry.
>
> And, if we add item No. 2 to item No. 3, then we can largely get rid of item No. 1.

Of course, the only power which can bring about this union between idle capital and idle labor under the American plan lies in the people. "When the people of America feel strongly enough about it," Mr. Wilkie said, "they will force the government to abandon . . . hostile policies." He also observed that the government tax program is especially discouraging to the pioneering type of investment. He added:

> First of all here's this business of soaking the rich. This has the same objective, but, of course, is less harmful than the various share-the-wealth proposals.
>
> Under these share-the-wealth proposals if we took the salary of everybody who received $150,000 and up, for example, and divided it among all the people in this country—no, that wouldn't do because the amount each would get would be only 15 cents. So let's say that $5,000 is enough for anybody to receive, and everything above that amount should be divided. That doesn't work very well either, because all we would get would be $2.32 a month.

The Seattle Daily Times

GETTING CURIOUS, AT LAST

So, instead of doing anything so drastic as that we set a very high tax on large incomes. If a man has an income of one million dollars, for example—and there are still two or three of these left—the state and Federal government promptly will take 84 per cent of it. If a man has an income of $100,000 the state and Federal governments will promptly take 40 per cent of it.

SOME of the rigors emphasized by Mr. Willkie have been softened, to some extent, by recent action of Congress. However, the author referred to the Federal Reserve Bank statistics and showed that on April 26, 1939, "more than $4,000,000,000 which could have been

used as a basis for credit expansion many times that amount, was lying idle in the banks of the country—almost 100 times the average amount lying idle in 1929."

Mr. Willkie concluded that the strict regulation of business gives the government an opportunity which it has not failed to grasp, meaning unfair competition with private business. And he cited as examples not only the TVA, with which Mr. Willkie has had such well-known difficulties, but also the RFC, the Commodity Credit Corporation, and the Housing Administration. Since business no longer has any recourse to the courts, and since the legislatures will only follow what appear to be the unmistakable wishes of their constituencies, Mr. Willkie concluded that the protection of sound American commerce and its resulting sound American labor lies "in the people."

Owen D. Young and the Holding Company

STUDENTS of utility regulation and of the development of the utility holding company were recently given an excellent thumb-nail description of the evolution of the pre-war holding company in the utility field by no less an authority than Owen D. Young, chairman of the board of General Electric Company. Mr. Young was appearing before the Temporary National Economic Committee, then sitting in Washington under the chairmanship of Senator O'Mahoney of Wyoming.

After sketching briefly the history of the electric power industry in this country, Mr. Young began:

> I want to tell you a story which involves the capitalization of utilities.
>
> I wish now to go back to the trying year of 1893, when the General Electric Company transferred reams of utility securities to the Street Railway and Illuminating Properties in order to raise $4,000,000 in cash, and thereby saved itself from bankruptcy. The Street Railway and Illuminating Pool, as it was then called, was strictly a liquidating concern. It had no intention of entering the utility business as such. It had no particular interest in or knowledge of management of such properties. In order to make its securities marketable, it was obliged, in many instances, if not indeed in most, to reorganize the operating units through receivership by reducing the prior lien bonds and preferred stocks. It thereby threw larger equities in the new common. The new bonds and preferred were sold to the public to the extent and at such prices as the market would take them. The new common shares remaining in the liquidating pool were, for the most part, not marketable through then established channels. Something new needed to happen and it did.
>
> Here then were producers and users venturing into a new field unafraid of new things, all young men, by the way. The rate of technical advance was tremendous. Human brains alive and at work everywhere were enlarging the field of electrical service and materially reducing the costs. Values began to be reflected in these common stocks and then the public itself began to buy them, in limited quantities to be sure, but nevertheless a market was emerging. Soon the old liquidating concerns had finished their task, usually with great profit to the stockholders who had dared to invest their money in the dark days of the panic.

But when utility common shares became valuable, the new managers did not wish to sell them, although they could have done so at profit. They were unwilling to lose control of the companies which they had really made, according to Mr. Young. As energetic Americans, however, they were ambitious to extend their management operations and achieve the added economy that such extension promises. Mr. Young continued:

> To meet this situation the utility holding company was invented, which enabled these ambitious young managers, not so much to sell their original common shares at a profit, as to obtain some funds against them through the issue of holding company securities, and thereby enable them to enlarge their operations in the communities which they served or to acquire an interest in other properties and so extend their management program.
>
> Then, too, the holding company was a better medium for the investor. Instead of taking common shares in an individual

operating company, he was able to invest in a diversified group of shares, and if he took preferred stock of the holding company he would gain some security through the equity margin represented by the common.

This, broadly, is the story of utility holding companies before the war. If holding companies have in these later days fallen under criticism, we must ever remember the service which they performed in the rapid expansion of electrical services to the public.

As an effective instrument for providing capital it made possible the rapid development and use of the steam turbine, not only in great centers of population but in power plants serving large numbers of rural communities through networks of transmission systems. In no other way could the small communities have received such high character of service at such low cost. . . .

The drive for economy and efficiency in the production of electrical power so urgently demanded by the utility engineers was supported by the work of the research laboratories and the engineers of the manufacturers. Indeed, the profits of the utility operating companies became so large as not only to attract investors as the result of that coöperation, but to precipitate constantly calls from customers for reduced rates. In the beginning, municipalities endeavored to regulate rates, but the utility rapidly outgrew the municipality. Then state commissions were charged with that responsibility, but the utilities in some cases overran state boundaries and so the Federal government found its justification for a limited entry into the field of utility regulation.

IN passing, Mr. Young touched upon the political debates incident to the entrance of the Federal government into the field of regulation. He observed that there had been criticism of the incompetence, not only of local regulatory bodies, but even state commissions, and hastened to add that, by and large, he thought such criticism was unfair and unwarranted. He stated:

The fact is that the research laboratories and the engineers in the electrical industry made such rapid progress in efficiencies and economies that regulating bodies were unable to keep up with them. As a consequence, by the time the rather cumbersome machinery of regulation established a rate, the efficiencies introduced meanwhile frequently kept the profits on the new rate as high as they were on the old ones.

This fact led customers to criticize the regulating boards. Such criticism to my mind was unjustifiable and, indeed, on the whole I think the fact that the utility companies were highly prosperous during the early days was of great public advantage. Their earnings were largely turned back into their properties and so supplemented the capital which they were able to get from the public and which in amount would, I think, have been inadequate to have provided for the rapid expansion of facilities which took place between the years 1910 and 1930.

After thus sketching the part which engineer-managers of the electric utility companies played in the development of the business and the formation of such organizations as General Electric, Mr. Young completed the picture with a description of the major ventures of General Electric itself into the utility field under the leadership of Charles A. Coffin. General Electric interests in 1905 organized the "Electric Bond & Share Company for the purpose of aiding the smaller utilities in raising junior capital and in selling their senior securities at a better price."

The development of the utility business in serving many communities from central plants through the use of long transmission lines compelled Electric Bond & Share as a matter of normal business evolution to grow into a large holding and management company. Mr. Young concluded:

Meantime, other operating units, through holding companies and otherwise, were extending their lines to serve not only small cities, but small villages and hamlets; indeed, they were reaching out for the farms. As these operating units became larger and the general trend of the utility business was profitable, the Bond & Share Company was able to handle its own financing and to provide its own capital requirements without help from the General Electric Company.

FOLLOWING the main part of his testimony, Mr. Young was questioned by one of the members of the committee, Dr. Isador Lubin, chief of the U. S. Bureau of Labor Statistics, as follows:

DR. LUBIN. And in justification of the growth of those holding companies you mentioned the fact that the investor was thereby given an opportunity to purchase securities over a variety of firms, as it were, as opposed to purchasing in underlying operating companies.

Has the experience of the last three or four years in your opinion led you to believe that the people who continued their holdings in these underlying operating companies came out better or worse than those who bought these securities in the holding companies?

MR. YOUNG. Let me say at the beginning that I dealt with the holding company as stated, as it existed up to the time of the Great War, if you noticed. I have not endeavored to deal with the development of the holding company since. That is quite another story.

DR. LUBIN. I also was very much interested in what you said about the regulation of utilities by municipal and state regulatory authorities. I take it there must be some hundreds of operating utility companies in the United States. Does the General Electric have any records available showing the number of instances in which rates have been cut, let's say, over a period of ten or fifteen years?

MR. YOUNG. I don't know that we have now. I think the Edison Institute has complete records of that.

DR. LUBIN. Is it your impression that those rate cuts were quite frequent?

MR. YOUNG. Yes; during recent years very frequent.

DR. LUBIN. But prior to the Federal government coming into the picture were they frequent?

MR. YOUNG. Yes, they were coming progressively along prior to that, but I think they have received stimulation—I think the industry believes undue stimulation—from the entrance of the government into the field.

DR. LUBIN. The reason I raised that question was the fact that I recently was looking at some figures on rates and the thing that struck me was that in city after city rates remained unchanged for periods of eight, ten, and fifteen years, despite the fact that new technology was cutting these costs tremendously.

MR. YOUNG. Quite true, and the profits were very large during that time. But it is also true that I don't think any regulatory body, during the period of most rapid development, could possibly have kept up with the efficiencies and economies of the engineers.

Mr. Young added that he didn't think that this temporary lag in rate reductions was especially harmful since the additional earnings went back into the properties and supplied a certain deficiency of capital which they probably then could not have obtained by the sale of stocks, bonds, and other securities to the investing public.

Notes on Recent Publications

GOD'S VALLEY. By Willson Whitman. Viking Press. $3.

—NOW WHAT CAN WE DO WITH TELEVISION? By Alva Johnston. *The Saturday Evening Post.* May 13 and May 20, 1939.

This 2-part series by a nationally known special feature writer contains an interesting discussion, from an entirely disinterested point of view, of the problems (economic as well as mechanical) of the infant art of television. As the latest birth in the public utility family, television merits careful study by all who are interested in public utility regulation over a long range—especially by those connected with communications services.

POSSUM KINGDOM INITIATES BRAZOS DEVELOPMENT. *Engineering News-Record.* June 8, 1939.

SPEEDIER UTILITY RATE DECISIONS MADE POSSIBLE. By H. M. Olmstead. *The American City.* June, 1939.

Analysis of the recent U. S. Supreme Court decision in Driscoll *v.* Edison Light & Power Co. 28 P. U. R. (N.S.) 65.

TEL. & TEL. RIGHTS NOT PROBABLE THIS YEAR. *The Financial World.* June 14, 1939.

TELEVISION'S HERE. By Alva Johnston. *The Saturday Evening Post.* May 6, 1939.

¶ "The Pensacola dam (Oklahoma) is being built as a power project for power development, and the Federal Power Commission has greatly reduced the amount of flood-control space in that dam in the interests of power . . . adds a great deal to the danger of the flood-control problem on the Arkansas river."

—DAVID D. TERRY,
U. S. Representative from Arkansas.

The March of Events

New TVA Proposal Offered

AN attempt was scheduled to be made in the House of Representatives this month to break the conference deadlock on the Tennessee Valley Authority bond bill and clear the way for consummation of the proposed TVA purchase of Tennessee Electric Power Company.

Representative Sparkman, Democrat of Alabama, a staunch TVA supporter, announced that he planned to ask the House to instruct its conferees to agree to the Norris bill, but with an amendment reducing the bond-issuing authority from $100,000,000 to $65,000,000.

Representative May, Democrat of Kentucky, head of the House conferees, indicated, however, that he would ask the House to stand behind its bill, which would impose important restrictions on the TVA, including a limit on the area in which it can operate.

The vote was expected to be very close. When the bond bill was before the House, an amendment which would have meant adoption of the Norris bill was rejected.

FPC Jurisdiction Questioned

THE jurisdiction of the Federal Power Commission over rates and charges was challenged on June 26th by the United Gas Pipeline Company and the United Fuel Gas Company in formal answers.

In answer to a petition filed by the Louisiana Public Service Commission on May 23rd for an investigation by the FPC of rates for natural gas charged by United Gas Pipeline and the Interstate Natural Gas Company and for joint hearings by the two commissions, United Gas Pipeline challenged the right of the Louisiana commission to appear as a party before, prosecute a complaint, or engage in any investigation or hearing jointly with the FPC.

The Louisiana commission has no authority to regulate the company's rate for natural gas sold, either in the state or in interstate commerce, the United's reply declared, contending that it was not a public utility or common carrier pipe line as it never had exercised the power of eminent domain, possessed no special franchise, privilege, or immunity, and its "sole undertaking and business in Louisiana is to purchase, sell, and deliver natural gas in the performance of private contracts made with certain selected customers."

Admitting that its business was "both interstate and intrastate in character," United Gas Pipeline said neither the Louisiana commission nor the FPC had jurisdiction to change the prices fixed by contracts under which the company delivered gas in Louisiana.

Interstate Natural Gas, in a separate answer to the Louisiana commission's complaint, denied the jurisdiction of the FPC over the concern's rates and charges, contending that it was not a public utility and was not subject to the provisions of the Natural Gas Act.

The answer of United Fuel Gas was in reply to a complaint filed by the city of Columbus, Ohio. In support of the concern's contention that it was not a public utility within the meaning of the Natural Gas Act, the company declared that its sales of natural gas to the Ohio Fuel Gas Company were made within West Virginia and that none of this gas was transported by United Fuel Gas outside that state.

Under a contract on file with the FPC, the price charged by United Fuel Gas to Ohio Fuel Gas for natural gas delivered within West Virginia is 26½ cents for one thousand cubic feet. United Fuel Gas asserted that this rate was not unfair, unjust, or unreasonable, but was not adequate fully to compensate it for the expense of producing the gas, transporting it to the point of delivery, providing a fund for amortizing and maintaining the plant and paying a fair return upon the capital invested.

REA Funds Granted

THE Federal Rural Electrification Administration last month announced allotments totaling $3,463,000 for 17 projects. The recipients included:

Hennepin county, Minn., new coöperative at Cedar; M. J. M. Electric Coöperative, Inc., of Carlinville, Ill.; Southern Illinois Electric Coöperative, Inc., in Mounds; Jo-Carroll Electric Coöperative, Inc., of Elizabeth, Ill.; Eastern Iowa Light and Power Coöperative of Davenport; Tri-County Electric Coöperative, Inc., of Portland, Mich.; McLeod Coöperative Power Association in Glencoe, Minn.

Also Central Minnesota Coöperative Power Association of Clements, Minn.; Mid-Yellowstone Rural Electrification Association, Hysham, Mont.; Northwestern Rural Electric Coöperative Association, Inc., of Meadville,

Pa.; Somerset (Pa.) Rural Electric Coöperative, Inc.; Stamford (Texas) Electric Coöperative, Inc.; Pierce-Pepin Electric Coöperative of Ellsworth, Wis.; Bridger Valley Electric Association, Inc., in Lyman, Wyo.

John M. Carmody, appointed REA Administrator on February 15, 1937, has been shifted to the newly created post of Public Works Administrator of the Federal Works Agency under the President's Reorganization Plan No. 1.

Utility Tax Investigated

TAXATION of all exempt properties owned by the Toronto Transportation Commission and the Toronto Hydro-Electric Power Commission was advocated by Alderman Donald Fleming last month. City council ordered the Civic Legislation Committee to report on the advisability of such a move.

Convinced that the time had come when both the Hydro and TTC should be forced to pay municipal taxes, Alderman Fleming contended that both public utilities should be able to pay such taxes without increasing the price of electricity or the cost of street car tickets.

Council, on a 13 to 4 vote, agreed that the legislation committee should study the situation without delay and report upon the advisability of applying to the Ontario government for legislation to abolish, in whole or in part, the municipal tax exemptions granted at the present time.

Both the Hydro Commission and the TTC, in Alderman Fleming's opinion, were capable of efficient and economical operation without being subsidized by Toronto taxpayers. The amounts of assessments were very large, he pointed out, and it would enable the council to make a worthwhile reduction in Toronto's tax rate if these tax exemptions were abolished.

In a joint report submitted to the council in March last year, Assessment Commissioner Farley, City Solicitor Colquhoun, and Finance Commissioner Wilson estimated an annual $1,158,772 increase in civic revenue could be obtained if the TTC, Hydro, and city waterworks were taxed through abolition of the existing exemptions.

Arkansas

Lower Coöperative Rates Approved

A NEW wholesale rate for power sold to Arkansas electric coöperatives serving rural families was approved in an order issued to the Arkansas Power & Light Company by the state utilities commission on June 27th.

A former rate of 1.23 cents a kilowatt hour was reduced to an average of between .87 and .91 cents, or approximately 26 per cent.

Six of the seven coöperatives operating in the territory served by the power company were affected by the order, which became effective July 1st. The seventh has no contract with the company.

The net monthly rate will be: Demand portion—$2.30 per kilowatt for each of the first 100 kilowatts, and $2 per kilowatt for each in excess of 100; energy portion—one cent per kilowatt hour for each of the first 180 kilowatt hours, and .7 cents for each additional kilowatt hour used.

These rates will be considered as gross billing. The net monthly billing will be obtained by application of discounts of: (1) 50 per cent where service is given from any point on the interconnected system of the company; (2) 30 per cent where service is given at any point not on the interconnected system.

The new schedule, the commission announced, would be available to rural electric coöperative corporations or rural membership associations organized under Act 342 of 1937 to retail electric service in rural areas.

California

Central Valley Bill Defeated

REFUSAL of the state assembly to pass the Central Valley project revenue bond bill was a "challenge" to the people of California, Governor Olson said on June 22nd. He stated:

"I am deeply disappointed, but I am more than ever determined that, within my legal power, I shall do everything I can to wrest California from the still potent grip of private corporation control and give the state back to its people.

"The people as a whole are morally and legally entitled to their own natural resources. These resources and their capabilities for unlimited service to all must be wrested from the grip of private selfish interests. The fight must be carried on until that objective has been reached."

In the debate that preceded action on the bill and in committee hearing, it was said administration spokesmen denied and were almost hurt by even an inference that the administration wanted the additional $170,000,000

revenue bonds set up in the bill to club the private power companies into submission and require them to bow to the more extreme of the public ownership philosophers or be driven out of business.

It was said to be one of the worst defeats suffered by the administration, owing to the stress it had put on the measure.

Governor Olson, in a statewide radio broadcast on June 25th, charged the 1939 state legislature made "one of the worst records ever made by any legislature" and acted in accordance with the desires of "special interests." He termed the session concluded last month "one of the most futile" in the history of the state.

The Atkinson oil bill, opening the way to public control and regulation of the production, transportation, marketing, and prices to the consumers of the oil and natural gas resources of the state, was termed the most important bill passed by the legislature.

Raker Act Amendment

U. S. Representative Richard J. Welch on June 29th introduced a bill in the House of Representatives amending the Raker Act to authorize sale of power from the San Francisco Hetch Hetchy power project.

The legislation was requested by the San Francisco board of supervisors which had voted to request the Congressman to introduce an amendment which would leave San Francisco free to dispose of its Hetch Hetchy electric energy as its people and their elected officials see fit.

The proposed amendment would strike reference to the sale of electric energy from § 6 of the act, leaving the prohibition against sale for resale applicable only to water. If such an amendment is accepted by Congress, there would be no need for further Federal court litigation over the city's agency agreement with the Pacific Gas and Electric.

Illinois

"Little TVA" Bill Rejected

THE "Little TVA" bill, providing for state hydroelectric plants at locks along the Illinois waterway from Lockport to near Utica, was killed by the state senate on June 27th. Power would have been supplied primarily to state institutions in northern Illinois, but any excess current was to have been sold to public utilities at wholesale.

The measure was introduced in the senate by Martin B. Lohman, Democrat of Pekin, after a similar bill was stricken from the house calendar in the eleventh hour rush toward final adjournment.

Funds for the program would have come from the sale of revenue bonds, retireable from earnings of the plants.

School Board Seeks Reduction

THE Chicago Board of Education last month asked the state commerce commission to investigate the electric rates it pays and to grant a reduction if warranted. The request was made in a petition signed by James B. McCahey, president of the board, and Richard S. Folsom, the board's attorney.

The petition stated that 385 of the board's 410 schools were still paying the Commonwealth Edison Company the rate of 3.5 cents a kilowatt hour that was established by contract in 1909. As arguments for a reduction, the petition said the cost to the company of generating and distributing current had greatly decreased since the contract was made and that the school board buys a much larger quantity of electric power now than it did thirty years ago.

Electric bills for the schools, which amounted to approximately $15,000 in 1909, now are approximately $600,000, the petition said. It added that the Edison Company since 1909 had on numerous occasions reduced the charges in its other rate schedules and had instituted many new and reduced rate schedules for other lines of business and to other buildings, both municipal and otherwise, but that the rate of 3.5 cents charged the school board had not been reduced.

Louisiana

Rate Reductions Ordered

THE state public service commission, acting on reports filed by its consultant, Mark Wolff, recently issued orders effecting further rate reductions applicable to a wide area in the state. The rate reductions ordered affect the future bills for electricity of the following companies: Gulf States Utilities Company, including the former Baton Rouge Electric Company, Louisiana Public Utilities Company, Gulf Public Service Company, and the electric utility department of the Gaylord Container Corporation.

The reduction ordered for the Gulf States Utilities Company covered its entire system in Louisiana, including the former Baton Rouge Electric Company, and applied to com-

mercial revenues and municipal customers. The total saving, which was estimated at $87,840, was additional to the rate reduction of $90,600 made by the commission in September and October of last year while the case was in progress.

The rate reduction order in the case of Gulf Public Service Company was likewise additional to the $48,453 reduction made by that company on June 1, 1938, thereby bringing to a total of $65,225 the amount of rate cuts resulting from Docket No. 2674, which the commission dismissed.

Gaylord Container Corporation serves electricity to the city of Bogalusa and the reduction of $5,000 ordered was in addition to the $10,140 reduction made effective October 1, 1938.

Michigan

Effect of New Labor Act

MICHIGAN'S new labor relations act, passed by the state legislature in its session recently adjourned, would give the newly created state labor board power to intervene in the threatened strike of Consumers Power Company employees which would cripple the power facilities of many out-state cities and communities, according to an interpretation of the state's police powers prepared by State Attorney General Thomas Read.

Under the new state labor act, a "cooling off" period of thirty days is mandatory after notice of intention to strike has been given before a strike can be called when public utilities, hospitals, or "other industries affected with a public interest are involved."

Commission Slashes Staff

THE state public service commission recently completed an economy program that was demanded by the late Governor Fitzgerald. Fitzgerald attributed legislation abolishing the old utilities commission, which was replaced by the public service commission, to the refusal of Paul H. Todd, former chairman, to order payroll economies.

The new commission complied with the late governor's mandate last month, dismissing eight of its thirty-two inspectors and six others.

Commissioner Gilbert I. Shilson said the action reduced the department's staff to eighty-eight. With previous actions since the new commission took office, he said, it would mean an annual saving of $45,000.

Mississippi

Move to Acquire Site Rejected

AN attempt of the Mississippi Electric Power Association to acquire property for extending lines and service of the Rural Electrification Administration was turned down in the Lauderdale county court last month.

The organization sought the property under authority of a legislative act, but Judge R. M. Boudreaux said that law conflicted with § 17 of the state Constitution giving property owners the right to due legal notice.

Observers thought this decision in the case of the association against John Martin and others might affect other REA associations.

New York

Power Board Slash Assailed

JAMES C. Bonbright, chairman of the Power Authority of the State of New York, on June 28th sent a letter to Speaker Heck and Majority Leader Hanley strongly protesting the 40 per cent cut in the authority's appropriation for the next fiscal year.

Dr. Bonbright pointed out that the reduction in the power authority's appropriation from the $85,000 allowed by Governor Lehman to $50,000, while only an insignificant saving, would seriously cripple the authority's work and "benefit only the self-seeking private power interests who tried to abolish the authority at the last session."

He called attention to the last annual report of the power authority which recommended a complete plan for the development and coördination of the state's St. Lawrence and Niagara water powers and, while protecting private power investors, opened the way to drastic rate reductions to homes and farms throughout the state.

North Carolina

City Loses Power Case

JUDGE H. Hoyle Sink ruled in Guilford superior court on June 30th that the city of High Point has no right to build a power plant on the Yadkin river under license of the Federal Power Commission and no right to issue bonds for its part of the $6,500,000 involved in the project.

The city was ordered in a permanent injunction to refrain from any further activity, operation, development, advancement, or continuation of the proposed hydroelectric plant.

The order concluded that "the only expenditure permissible under the foregoing shall be disbursements for the costs incident to this trial, which shall be taxed by the clerk as provided by statute."

Counsel for the city at once noted an appeal to the state supreme court.

Two cases were involved in the judgments. One was brought by J. W. McGuinn, High Point taxpayer, with the Duke Power Company and a number of High Point corporations as intervenors. The other was brought by Yadkin county. The former was heard in Guilford superior court earlier last month.

Judge Sink's ruling in the Guilford Case held that the Yadkin river was nonnavigable, that the proposed dam would have no effect upon navigation, and that the city had no right to enter into contract for the construction.

In the Yadkin ruling Judge Sink reiterated these opinions and in addition held that the entire control of the Yadkin river was vested in the state of North Carolina and that the city had no right to become party to a contract which weakened the state's control. He ruled also that High Point had no right to condemn lands belonging to Yadkin county.

Ohio

Asks PUC Gas Cost Inquiry

ALREADY involved in one costly gas rate battle, facing the possibility of litigation with the Cleveland Electric Illuminating Company, and embroiled in a franchise scrap with the Cleveland Railway Company, the Cleveland city government on June 28th entered another phase of its rate fight with the East Ohio Gas Company.

The city and East Ohio have been unable to agree on terms of a 6-month truce and the city filed in Columbus a request for an investigation by the state public utilities commission of the cost of purchasing and transporting natural gas from Ohio wells to Cleveland. It was also reported that the city asked the commission to determine the company's distribution costs within the city.

The city's request was made in connection with the appeal of the company from the city's present rate ordinance, which had been in force two years and expired June 30th. That ordinance, however, was said to be the subject of far from completed litigation before the Ohio Supreme Court and the Federal Power Commission.

The gas company proposed a few months ago that a truce be arranged under which both sides would agree that the proper rate for the next six months would be the one ultimately fixed by the state supreme court. The gas company said that if the rate finally approved was lower than 68.88 cents it would make a refund but would not attempt to collect retroactively any higher rate it might be allowed.

The city refused to accept this proposal on the ground that the FPC might find that Cleveland was entitled to a lower rate than one determined by the court.

Municipal Plant Rates Cut

A REDUCTION of $248,000 a year in the municipal light plant's rates was voted last month by the Cleveland City Board of Control. The rate reduction resolution was adopted by a vote of 6 to 1 and the new schedule of charges would go into effect after it had been confirmed by the city council.

Welfare Director Fred W. Ramsey opposed adoption and said a reduction in the municipal light plant's rates was not necessary and any excess profits the plant had should be distributed in a way that would benefit the taxpayers of Cleveland as a whole.

Although he voted for the rate reduction, Safety Director Eliot Ness supported Director Ramsey's argument that the light plant should apply for the benefit of the general public any surplus it possesses by virtue of the fact that it does not have to pay the taxes imposed on a privately owned utility for the support of the city government.

Mayor Harold H. Burton pointed out that the city charter prevents such a distribution of the plant's excess earnings, although state law permits cities now under home rule to use their own utilities' profits for general operations.

Attorney Paul W. Walter, head of the citizens committee that directed the successful election campaign last December for approval of a bond issue to finance, along with a PWA grant, a $5,500,000 expansion of the light plant, retorted to Ramsey that every time the mu-

nicipal light rates have been reduced, a reduction by the Cleveland Electric Illuminating Company has followed. Attorney Walter asserted:

"This means that the great majority of citizens do benefit from a municipal plant rate reduction. Since 1914 the plant has, in this fashion, saved the community $50,000,000 in power rates. The plant's primary purpose is to show how low rates could be."

Oklahoma

Grand River Dam Studied

THE Grand River dam project was back in the hands of Army Engineers late last month, accompanied by a request for further study and recommendation for a Federal power license. Such a license would give the Grand River Dam Authority the right to go into Federal courts in land condemnation proceedings. The authority believes a better price for land can be obtained through Federal than in state courts.

The move also would permit the authority and engineers to settle controversies over the height to which flood waters would be stored back of the dam and to decide whether the government would include part of the project in its flood control program.

Engineers have insisted the maximum level of flood water should be 755 feet above sea level, while the authority has contended 750 feet is sufficient. Authority officials contend it would require an additional 8,000 acres of land to meet the 755-foot level.

A Federal Power Commission order issued in January would require the 755-foot level and provide for control by engineers on the theory the Grand river is a navigable stream.

The authority's application for modification of the power commission's license requirements would remain pending until new recommendations have been made by the Army Engineers. The application asked requirements of the power commission be changed so control by the War Department over flood control operating above a 745-foot level would be conditioned upon the government making available flood control funds, obtaining the necessary lands and easements, and providing for damage costs above the 750-foot level.

Oregon

Petitions for PUD Circulated

PETITIONS for the establishment of a public utility district in Portland were circulated recently. The name of the group sponsoring the petitions is the "Bonneville for Portland Committee."

The purpose of the project, according to the sponsors, is public ownership of a local electric power distributing system which will use energy from Bonneville dam. If 5,452 names are obtained to the petitions, the state hydroelectric commission will make a report on the feasibility of the proposed district. A final petition, requiring the same number of signatures, then will be circulated.

The seven sponsors of the district are Miss Bertha J. Beck, secretary of the committee, and also secretary of the Oregon state grange; B. A. Green, attorney for the American Federation of Labor; Rev. George L. Poor, of the University Park Methodist Church; Harry M. Kenin, state senator from Multnomah county; George M. Clevenger, retired U. S. Army captain; Mrs. Cleone M. Nelson, and Harlow F. Lenon.

Hood River PUD Muddled

THE city of Hood River last month rejected a proposed public utility district, but the voting precincts outside the city approved the utility district program. As a result, the hinterlands alone could form a district, with the approval of the state hydroelectric commission.

The county's three precincts, which are in that part of the county forming practically all of the Hood river valley, voted approval by a margin of 922 to 685. The city rejection of the PUD in its precinct was by a margin of 555 no to 385 yes.

Pennsylvania

Vetoes Own Flood Idea

GOVERNOR Arthur H. James, rushing to beat the June 28th deadline for action on bills passed by the recent state legislature, on June 27th announced action on a voluminous stack of major measures. The governor, however, balked at enacting into state law his policy

regarding Federal flood control powers, by banning the use of flood-control dams for any purpose other than flood control or stream flow.

Governor James vetoed House Bill No. 909, approved by the legislature, to restrict the state water and power resources board's powers to approve flood control projects, in accordance with flood policies previously announced by the governor. He issued a lengthy explanation of his action in vetoing the measure, saying that it undoubtedly would "cause the suspension of reservoir building already undertaken and now in progress."

The action was almost a reversal of Governor James' previously announced stand of refusing to approve any further Federal flood dams, unless the state could maintain its jurisdiction over operation of the dams, and a recognition of the Federal government policy of refusing to build dams where full approval is not given by state agencies.

The new flood control bill, sponsored by Representative Wrayburn B. Hall, Republican of Potter, chairman of the House Forestry Committee, was studied by Attorney General Claude T. Reno before it went to Governor James for action, and Mr. James' decision was believed based on the legal study. Mr. James' veto message said:

"The bill presents a broad problem of the comparative rights of the Federal government and the state government in the acquisition and use of lands and waters within the commonwealth of Pennsylvania.

"Although we are of the opinion that this bill would not conflict with any specific Federal statutes dealing with flood control, it would contravene broad constitutional problems regarding the supremacy of the Federal government in the performance of public works, which would undoubtedly redound to the detriment of the commonwealth of Pennsylvania and cause the suspension of reservoir building already undertaken and now in progress.

"We have been advised that the Federal legal authorities have interpreted certain provisions of this bill as restrictive on the absolute jurisdictional requirement of the Federal government. It is the policy of the Federal government not to engage in building or construction of any kind on land and water except those over which it has complete jurisdiction in all matters."

The Hall bill, only important flood control measure of the 1939 legislature, was proposed to prevent the use of any Federal flood control dams for development of hydroelectric power—an important factor in Governor James' opposition to Federal control.

Power Rates Reduced

THE Pennsylvania Power Company, with main offices in New Castle, filed a new tariff, effective July 1st, making annual net reductions in rates of $168,000 and annual net increases of $2,300 for 28,107 customers, the state public utility commission announced late last month.

Reductions totaling $105,800 a year were given 27,476 residential customers by withdrawing the immediate rate and substituting the objective rate and by establishment of a 1½ cent step for all used in excess of 10 kilowatt hours per month and up to 500 kilowatt hours.

Commercial customers will save $6,500 yearly by having their active load assessment reduced by elimination of outside lighting and battery charges. The remainder of the reduction, amounting to $55,700, will be distributed among industrial primary power, high-tension power, and seasonal ice-making customers.

Application of a $1 minimum charge, instead of a 50-cent minimum, to some residential and commercial customers in New Castle accounted for the $2,300 net increase.

Acts to Bar Power Resale

THE state public utility commission on June 30th directed 62 electric companies to show cause why they should not include in their tariffs a provision that no electricity shall be sold to a consumer for resale to another.

D. J. Driscoll, commission chairman, added that rates for electricity sold by landlords are not under the commission's jurisdiction and may be higher or lower than the charges made for electricity direct from the utility, and the utility had no right to make any changes in the landlords' charges.

The proposed tariff changes would affect owners of large apartment houses, apartment hotels, office buildings, loft buildings, and department stores who resell current to their tenants; industrial firms who rent part of their plants and resell current, and coal mine companies which resell current directly or indirectly to tenant employees.

A hearing will be held July 26th in Harrisburg.

South Carolina

Application Filed with FPC

THE Orangeburg-Aiken Hydro-Electric Commission, of Orangeburg, last month filed with the Federal Power Commission an application for license for a power project on the Edisto in Colleton, Dorchester, Orangeburg, Bamberg, Barnwell, and Aiken counties.

The project would consist of a dam and hydroelectric power plant on the Edisto river just above its confluence with Cattle creek; a steam power plant at Graniteville, S. C., and a transmission line extending from the hydroelectric plant to the steam plant and extending thence to North Augusta, S. C. The dam would have a total length of 16,500 feet and maximum height of 50 feet, and would consist of two rolled earth-fill sections separated by a concrete section 550 feet long containing the spillway and intake works.

The reservoir created by the dam would have surface area of 11,500 acres and storage capacity of 150,000 acre-feet at normal lake elevation of 102 feet mean sea level datum. The hydroelectric power plant would contain three units of 4,023 horsepower each designed for a normal operating head of 32 feet, and the steam power plant would contain one unit of 4,023 horsepower, making the total installed capacity of the project 16,092 horsepower. The transmission line would transmit energy at 44,000 volts and would pass through St. George, Branchville, Orangeburg, Springfield, Windsor, Aiken, and Graniteville, and would terminate at North Augusta, a total distance of approximately 100 miles, all in South Carolina.

It is proposed to sell the power generated at these plants to the city of Orangeburg, which owns its own distribution system, to the Aiken County Coöperative Association which retails power from 207 miles of rural lines, and to The Graniteville Company, of Graniteville, S. C., manufacturers of cotton cloth.

Tennessee

Memphis Utilities All Municipally Owned

MEMPHIS on June 27th became the first large city in the United States with electric, gas, and water systems all municipally owned and operated.

Transfer of gas and electric properties gave the city a $35,000,000 3-way utility set-up serving 60,000 electrical, 50,000 water, and 40,000 natural gas customers.

Tennessee Valley Authority power was said to have helped bring the public ownership fight in Memphis to a head. The "yardstick" has saved Memphians a million dollars since the rates were cut last December 1st. Another 15 per cent cut is due by fall. By then the city expects to have built up the operating capital of its young utility, and will then go to the basic TVA rates. The estimated annual savings then will be $2,400,000.

Memphis also has announced a 10 per cent residential gas rate cut.

The deal completed on June 27th was the transfer of Memphis Power & Light Company electric and gas distribution properties to the city of Memphis and TVA. TVA paid $2,110,000 for the utility's transmission lines. Memphis paid $15,250,000 for the gas and electric networks.

Memphis gets power from Pickwick Landing dam on the Tennessee river.

Shortly after the deal was completed, the city commission faction aligned with E. H. Crump, city-county political leader, divested Commissioner Ralph Picard of his authority on public service matters, installed Joe Boyle of the Crump faction in Picard's post of commissioner of public service, and gave Picard Boyle's erstwhile commissionership of finance and institutions.

Retains TEPCO Employees

THE Chattanooga Electric Power Board recently announced for the first time that it would retain in its employ practically all employees of the Tennessee Electric Power Company. This assurance was made in writing in the board's official statement regarding the scheduled sale of $13,200,000 in city revenue bonds to finance Chattanooga's share of the TEPCO purchase price.

The power board also announced its plan to construct a new $300,000 building in which to house the municipal power board's offices. Superintendent S. R. Finley said that the location of the building would not be determined until it had been definitely established that the TVA-sponsored purchase of the utility's properties had been completed.

TVA had agreed to take over all of the buildings of the Tennessee Electric Power Company in Chattanooga and pay the city $150,000 for the portion of the building originally allotted to Chattanooga. This would reduce the city's share of the cost of acquisition of TEPCO's properties by $150,000, reducing the original total to $10,850,000.

Texas

Denison Dam Allotted Fund

WORK on the Denison-Durant dam in Red river was assured under funds voted by the U. S. House and Senate for flood control in the $300,000,000 War Department civil functions appropriation bill, as submitted by the conference committee recently. The bill car-

ried $133,000,000 for flood control, of which there would be allocated by the board of Army Engineers to the Red river dam the sum of $5,000,000 for the fiscal year beginning July 1st, to start construction.

The Denison-Durant dam when completed will cost $54,000,000 to control floods in Red river and its tributaries, and to develop hydro-electric power. Opposition to allotment of Federal money for the dam was expressed by Governor Leon C. Phillips of Oklahoma, but all members of the Oklahoma delegation favored it.

Representative Sam Rayburn of Bonham, House Democratic leader who has sponsored the dam since its inception, pointed out that in addition to solving the flood problem it would produce a vast amount of electric power that could be sold advantageously to the consuming public. The dam, he explained, would keep the water at the level to generate a maximum amount of power, and sufficient capacity left to take care of a flood three times that of 1938.

Gas Rates Cut

NEW domestic gas rates assuring a saving of $100,000 a year went into effect in El Paso on July 1st. The new rates were offered June 26th by the Texas Cities Gas Company, a subsidiary of the Lone Star Gas Company, and were accepted by the city council after being approved by Railroad Commissioners Jerry Sadler and Ernest O. Thompson.

Success of El Paso in getting gas rates reduced may help Dallas in a similar move, Utilities Supervisor Joseph F. Leopold stated. The new rate for El Paso would not be lower than present charges in Dallas, he said. He was reported to be negotiating with gas company officials on a reduction of several cents.

Washington

Report Scores Duplication

DECLARING that the duplication of private power facilities in Seattle is a "complete waste" to the extent of $3,000,000 a year and is paid for "only by the people in their light bills," the annual report of the department of lighting of Seattle for 1938, released on June 28th, proposed that all private facilities in Seattle be acquired for public operation as the "only logical step" to correct the situation.

The report, signed by W. J. McKeen, acting superintendent of lighting, noted that this annual loss of $3,000,000 was "constantly growing" and that if the condition was not corrected "we may expect soon to be wasting four to five millions of dollars annually." Seattle is served by both the Puget Sound Power & Light Company and the public plant, known as City Light.

If the savings that can be effected by the elimination of duplication are put into effect at once, the report said, "the business of the private company will have been largely paid for in cash in a few years and the people will have saved for themselves in actual cash many millions of dollars."

Promising that all rates for electric light and power would be cut in half after duplication was fully eliminated, the report set forth that all this could be done "without one cent of cost to the taxpayers or without any lien whatever being placed against the properties of the taxpayers, or against either the existing properties of city light or the properties that would be acquired from the company." The lien, it was explained, would be solely against earnings.

Discussing the huge Federal power developments in the Northwest—Bonneville and Grand Coulee dams—it was stated that these plants "must finally be coördinated for mutual help by extending the transmission lines now connecting the Skagit river, near the Canadian boundary, to Seattle, and by an intertie to Tacoma." It was also predicted that when Bonneville and Grand Coulee are completed a superpower system will be built. The report asserted:

"No one need fear that these Columbia river plants will be too large, or that they are in any way a menace to existing power systems, public or private. The electric age is still in its beginning, and uses for electricity are multiplying every year. The real problem ahead is to transmit and distribute the current to the user in ample quantity and at the lowest possible cost."

Wisconsin

Returns Unused Funds

THE state public service commission will return about $35,700 of its appropriation to the state general fund because it was not used, it was announced recently. This lapse of funds was not from the fiscal year which closed June 30th, but was from the 1937-38 fiscal year. The lapse by the commission was made one year later because part of the funds covering expenses in the fiscal year are not collected until three months after it ends.

The Latest Utility Rulings

Coöperatives Not Required to Safeguard Telephone Line against Inductive Interference

THE Arkansas Supreme Court held that the commission had properly refused to condition its issuance of permits to rural electric coöperative corporations upon their paying for improvements to safeguard rural telephone lines against inductive interference caused by parallel power lines. The court reversed a lower court decision against the coöperatives.

The court pointed out that the commission by express language of the statute is denied jurisdiction over the coöperatives in question other than to determine whether public convenience and necessity will be served in the particular territory or area into which, or through which, they propose to operate.

The court said concerning the commission's power to decide disputes involving coöperatives that such power of limitation relates to methods of construction and the quality and extent of service in relation to such matters as rates, rather than to controversies between contending utility companies in respect to matters involving damages to their property. Determination of the former, it was said, is legislative in its nature, while the latter is judicial. *McConnell et al. v. Arkansas Department of Public Utilities.*

Supreme Court Upholds Power of State to Reduce Bridge Toll Rates

AN order of the California commission reducing tolls for passage of automobiles and persons over one of the two bridges owned and operated by the American Toll Bridge Company was sustained by the United States Supreme Court. The order had been attacked on the ground that it impaired contract rights, was entered without according due process of law, and was confiscatory.

The contract question was presented because legislation providing for the granting of bridge franchises restricted the return of bridge companies to 15 per cent on a specified rate base and also provided that no bridge rate should be increased or diminished during the term of the franchise unless it should be shown to the proper authorities that receipts from tolls in any one year were disproportionate to the rate base. The bridge company contended that under its franchise it had a contract right that the bridge tolls should not be reduced by the public authorities unless it should first appear that they were yielding a rate in excess of 15 per cent. The court, however, declared:

> Neither in text nor in reason is the "15 per cent" prescribed as maximum yield tied to, or made the test by which to ascertain whether receipts from tolls are, "disproportionate." We construe these statutory provisions to negative appellant's claim that by the franchise in question the state bargained away power to reduce tolls for use of the Carquinez bridge unless annual return becomes more than 15 per cent.

The claim was made that the commission had denied procedural due process by excluding the rates at another bridge from the proceeding. It moved to include an investigation of those rates. It suggested that the bridges were part of a single system but competed with each

other, and that the operations of the other bridge were less satisfactory financially. The court said that, in the first instance at least, determination of the proper unit for rate making was for the commission, and it held that the record disclosed no basis on which it reasonably might be held that by limiting the investigation to the tolls under review the commission had abused its discretion.

The court, in holding that the company had failed to meet the burden of proof as to confiscation, said:

> Appellant fails to establish, by allocation or apportionment to the traffic covered by the tolls so reduced, the operating expenses, cost of depreciation, taxes, and contributions to the sinking fund for amortization of investment that are fairly attributable to the service covered by the order; it also fails to establish the amount of property value that is justly assignable to that traffic. Obviously, the return to be yielded by the reduced tolls cannot be found without comparison of the revenues to be derived from the service with the amounts of operating expenses and other charges rightly to be made against them. Inadequacy of revenues from all traffic does not tend to show that the rates on automobiles and persons prescribed by the commission's order are too low.

American Toll Bridge Co. v. California Railroad Commission et al.

Gas Company Prevented from Divesting Itself of Duties As Public Utility

THE supreme court of Ohio affirmed an order of the public utilities commission denying an application of a gas company for authority to withdraw its properties from service to domestic users of gas and to be declared not subject to the jurisdiction of the commission, and held that such company was a public utility and subject to commission regulation. Whether a corporation is operating as a public utility is determined by the character of the business in which it is engaged, said the court.

It was further held that a public utility is bound to serve, to the extent of its capacity, those of the public who need the service and are within the field of its operation at reasonable rates and without discrimination. This duty, it was said, does not permit a public service corporation to pick out good portions of a particular territory, serve only select customers under private contract, and refuse service to the remaining portions of territory and to other consumers. The court continued:

> Regardless of the right of the public to demand and receive service in a particular instance, the question whether a business enterprise constitutes a public utility is determined by the nature of its operations. Each case must stand upon the facts peculiar to it. A corporation that serves such a substantial part of the public as to make its rates, charges, and methods of operations a matter of public concern, welfare, and interest subjects itself to regulation by the duly constituted governmental authority.

It was concluded that a public utility cannot divest itself of its duties as such (1) by changing the purpose clause of its articles of incorporation, (2) by not exercising the right of eminent domain, (3) by not holding itself out to serve the public or any class of the public generally, or (4) by selling to select consumers by private contract only. *Industrial Gas Co. v. Public Utilities Commission, 21 N.E. (2d) 166.*

Rate Differences Held Not to Support Claim of Illegal Overcharges

A REPARATION claim, according to a holding of the supreme court of Washington, cannot be based upon a mere difference in rates. This ruling was made in a case where the court sustained an order of the Washington Department

of Public Service dismissing a complaint by an electric customer based upon alleged overcharges during a period of years, first under a rate contract and later under filed schedules.

Claims for overcharges during the first period were said to be concluded by the law of the state which requires public utilities to file with the commission schedules showing all rates and charges made, all forms of contracts, and all rules and regulations relating to rates, charges, and service. The statute also prohibits any change in rates except upon notice to the commission and upon publication thereof, or unless the commission shall order otherwise. The court said that it must be assumed until the contrary was shown that the company had complied with the statute.

The court further stated that it was the settled law that when a scheduled rate is challenged, the challenge affects the rate only from the date of the filing of the complaint, and there can be no reparation for alleged excessive charges imposed prior to that time.

The complainant was a company engaged in furnishing water for irrigation. It alleged that lower rates had been charged to similar companies. The court, after stating that a mere difference in rates does not of itself constitute an unlawful discrimination, continued:

> A comparison of rates may be persuasive and may be controlling, but only when it is also shown that the conditions are comparable and that the rates used for comparison are just, fair, reasonable, and sufficient . . .
>
> Furthermore, mere discrimination, if there be such, is not of itself sufficient to call for reparation, however much it may call for some other remedy or disciplinary measures against the public utility company.

Complaint had been made that a gross rate had been imposed upon the complainant for slow payment while such gross rates had not been imposed upon another company. As to a contention that the gross rate was unlawful because it was a penalty, the court expressed the view that such a provision within reasonable limits is valid, its purpose being to place a premium upon the prompt payment of bills. Public service commissions of thirty or more states of the Union, said the court, had expressed that view. In answer to the contention that imposition of gross rates was discriminatory, the court declared that this did not furnish a basis for reparation. If the penalty provision should be applied to all other consumers as well as to the complainant, then the proper remedy was not to remove it altogether but to compel its observance uniformly. *State ex rel. Model Water & Light Co. v. Washington Department of Public Service et al. 90 P. (2d) 243.*

Assignment of Rentals of Leased Municipal Plant Approved

THE supreme court of Pennsylvania approved a proposed assignment by the city of Philadelphia of rentals received by it from the lease of its gas plant, holding that such an assignment does not create a debt within the meaning of the constitution, and that no law prohibits such use of these moneys.

The court stated that the proposed assignment did not create such a debt, notwithstanding the remote contingency that if, by reason of legislative regulation of gas rates, the amounts received by the city should be less than the agreed sum, the city would levy a special tax to pay the deficiency. A municipality may assign the rentals derived from the lease of its gas works which it owns in its proprietary capacity, it was said.

In answer to the contention that the city charter act prevents the use of the proceeds for current expenses, it was held that the proceeds from the assignment of a municipally owned gas plant can be applied to current expenses, since the rentals of the gas plant have always been regarded as miscellaneous receipts, available for current expenses.

The petitioner also contended that the proposal purported to bind future city councils to levy a special tax if legislative regulation of rates tended to reduce the proceeds below the agreed amount. He felt that taxation is a governmental function and that the city in its proprietary capacity could not bind itself to perform a governmental act in the future. The court said:

> Whatever may be the rule in other states, it has been positively established in this jurisdiction that legislative bodies may enter into transactions or agreements binding upon their successors which may require the levying of a tax in the future.
>
> The city, in dealing with the gas works, is acting in a business capacity and its contracts relating thereto are binding upon future city councils. Baily *v.* Philadelphia, 184 Pa. 594, 39 Atl. 494, 39 L.R.A. 837, 63 Am. St. Rep. 812. There are so many illustrations of this rule in reported cases that to enumerate them would be superfluous. But the gas works is unquestionably a public enterprise and we have held that expenditures on or about such municipal business improvements can be met by taxation (see Shirk *v.* Lancaster [1933] 313 Pa. 158, 169, 169 Atl. 557, 90 A.L.R. 688) just as receipts therefrom can be devoted to current governmental purposes. The gas works, waterworks, sewerage systems, electric light plants, and other business enterprises of a municipality need not be self-sustaining. Therefore if the city may validly appropriate tax monies to the expenses of such enterprises, it may enter into contracts, the effect of which may be to give rise to the necessity of a tax levy by future councils.

In conclusion the court held that the commission need not approve the lease and assignment because it has no power to regulate rates charged by municipally owned gas plants, nor to determine rentals to be paid to the city, nor to interfere with property of the city which would include the right to dispose of the rentals. *Graham v. City of Philadelphia, 6 A. (2d) 78.*

State Jurisdiction over Interstate Motor Carriers Upheld

THE court of civil appeals of Texas reversed a judgment of a lower court and dissolved an injunction on the ground that the plaintiff was not authorized to operate an interstate transportation service on state highways. The Federal Motor Carrier Act, it was held, is remedial and implies recognition of a state's power to withhold or condition the use of its highways in transportation for hire. The court made the statement which is quoted below:

> The Federal Motor Carrier Act operates to limit such provisions of the Texas motor carriers law as confers upon the railroad commission the power to determine whether there exists a public convenience and necessity for the proposed service founded upon the adequacy of the existing transportation facilities, etc., to carriers of property moving intrastate. . . . But it does not deprive the railroad commission of its jurisdiction and power to determine whether the safety of the traveling public and the preservation of the state's property in the highways will permit any additional burdens of commerce upon and over the highways irrespective of whether such burdens result from interstate or intrastate commerce thereon.

Another issue involved was whether or not the order of the trial judge constituted a temporary injunction from which an appeal would lie. The court ruled that the fact that an order was called a temporary restraining order in the judge's fiat calling for its issuance is not controlling in determining the character of the order, but the restraint which the order imposes, its effect, and the object to be accomplished determine its true name and character.

The ruling of the court was to the effect that an order temporarily restraining state officers from arresting or molesting a motor carrier while engaged in interstate commerce over certain state highways, such order to remain effective until changed by further order of the court, and directing defendant to show cause why the temporary restraining order should not be made into a temporary injunction pending final hearing, constitutes a temporary injunction from which appeal would lie.

It was further held that a motor car-

rier, by not stating affirmatively that he had applied to the state commission for a certificate, and by not showing that the condition of the highways would remain uninjured by the use sought by him, failed to allege facts showing a right to the use of state highways for transportation of property for hire in interstate commerce. *Smith et al. v. Coleman, 127 S.W. (2d) 928.*

Rates of Common and Contract Carriers

THE Utah commission established rates for common carriers and contract carriers on a comparable basis in order to avoid discrimination and to promote uniformity. The commission had decided that rates for such carriers could best be handled by districts or natural trade routes because of the fact that in some districts of the state the operating and traffic conditions were vastly different from those in other districts.

It was found that in most instances the services of the common carriers and of the contract carriers were competitive, but the rates and charges of the various operators differed widely. The commission said:

> Generally speaking, the rates of contract operators are somewhat lower than that of the common carriers for similar services. The practice of employing contract operators to haul general commodities has had the effect of placing some merchants within the district in a preferred position in so far as transportation rates and charges are concerned, giving them an advantage over their competitors. The commission feels that such an adjustment results in a discriminatory situation in so far as the wholesalers serving the district and the retailers within the district are concerned and that a more healthy condition will follow an adjustment whereby the rates on general merchandise of both types of carriers are placed upon a common basis.

The commission, accordingly, proposed a mileage distance schedule of class rates and a set of merchandise commodity rates based on those mileage class rates for the merchandise items usually handled by merchants within the district. The class rates and merchandise rates set forth were required to be applied as maximum and minimum rates for all common carriers, and the merchandise rates were to apply as minimum rates for all contract carriers operating in the district. *Re Rates and Practices of Common Motor Carriers (Investigation Docket Nos. 4, 5).*

Ordinance Limiting Carrier's Use of Streets Held Valid

THE court of appeals of Kentucky held that an ordinance directing that, in the conduct of their business in the city, common carriers shall use certain streets only and maintain depots at sites approved by the mayor and council was reasonable and valid. Municipalities, where given the power to regulate the use of their streets, may enact valid rules and regulations for the government and regulation of motor vehicles within such cities, the court said.

It was contended that the ordinance was invalid in that it prohibited carriers to use any of the city streets as a common carrier, and that the right to use the state's public highways is granted by statute. The court held that the Motor Vehicle Law defining public highways did not revoke the charter-given right of municipalities to control and regulate exclusively the use of the streets and highways within their limits.

On the question whether or not the ordinance conferred arbitrary power upon municipal authorities, it was said:

> However, the acting authorities of the city are not to be regarded as having been thereby vested with personal or arbitrary power, but as restrained in its exercise, in that such

discretionary power given them is subject to the control of the courts, when it appears that, in its exercise, they have acted arbitrarily in the premises and have abused the public trust reposed in them to properly and fairly administer the provisions of the ordinance. In the administration of the duties imposed upon them by such terms of the ordinance, municipal authorities cannot make discriminatory use of the discretionary powers given them, by granting privileges to certain individuals and arbitrarily denying them to others applying therefor under like circumstances and conditions. Where such abritrary exercise or abuse of the police power given a municipality is attempted, the offending authorities may be compelled by mandamus to grant the right or permit, reasonably and properly applied for by one showing himself entitled thereto.

Bell Brothers Trucking Co., Inc. 127 S.W. (2d) 831.

Other Important Rulings

THE California Railroad Commission held that it is unnecessary to prescribe minimum rail rates although certain rail rates are below a maximum reasonable level where there is nothing in the record to indicate that the reductions below the truck rate found reasonable have been effected solely for the purpose of destroying truck competition, since on the contrary it seems probable that such reduced rates have been established in order to move traffic which could not bear higher rates. *Re Rates, Rules and Regulations of Common Carriers (Case Nos. 4293, 4088-Part "G," 4123, 3962, 3941, Application No. 19636, Decision No. 31924).*

The Pennsylvania Superior Court held that a commission order dismissing an application for registration as a common carrier must be sustained where there is sufficient competent evidence in support of the commission's findings that the rights, powers, and privileges sought have not been enjoyed, possessed, and exercised by the applicant prior to the effective date of the regulatory statute, and continued to be so enjoyed, possessed, and exercised by him since that time. *Bickley v. Pennsylvania Public Utility Commission, 5 A. (2d) 806.*

The Colorado commission declared that a private carrier permit, unlike a common carrier certificate, is a mere license to operate, and that neither statute nor commission rules and regulations require the commencement of operations under such a permit within any particular period of time. This ruling was made in connection with authority to transfer a permit. *Re Everitt (Application No. 4435-PP-BA, Decision No. 13408).*

The Colorado commission, in dismissing a complaint seeking the revocation of portions of authority to operate as a motor carrier because of abandonment of service, held that abandonment of rights under a permit must be clearly proved by competent evidence, and that nonuser alone is not conclusive proof. *Re Everitt (Case No. 4716, Decision No. 13431).*

The Wisconsin commission said that in determining whether a railway company should be authorized to discontinue an agency station the needs of the community must be considered as well as the earnings and cost of operation of the station. *Re Chicago & North Western Railway Co. (2-R-956).*

The public utilities commission of Colorado held that it cannot prescribe a reasonable valuation to be placed upon certificates of convenience and necessity or pass upon disputed questions between seller and purchaser of a carrier's right. *Re Ward (Application Nos. 4826-PP, 4826, Decision No. 13446).*

NOTE.—The cases above referred to, where decided by courts or regulatory commissions, will be published in full or abstracted in *Public Utilities Reports.*

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TITLES

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Public Utility Commission

v.

Abington Electric Company

[Complaint Docket No. 11397.]

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[May 2, 1939.]

INVESTIGATION *on motion of Commission to determine whether rates of electric utility are unjust and unreasonable; reduced rate schedules ordered.*

By the COMMISSION: On April 26, 1937, this Commission instituted the instant inquiry and investigation, upon its own motion, to determine whether or not the rates of Abington Electric Company, as set forth in its Tariff Pa. P. U. C. No. 10, were unjust and unreasonable and produced an excessive return. Hearings have been completed and the matter is now before us for disposition.

Respondent is an electric utility, incorporated March 21, 1911, under the laws of the commonwealth of Pennsylvania. It provides electric light and power service to some 4,065 consumers in a largely rural district comprising five boroughs and ten townships in Wyoming and Lackawanna counties, and also sells power at wholesale in this territory. Its entire capital stock, consisting of 20,000 shares of no-par common capital stock at a stated value of $200,000, is owned by Republic Service Corporation, a holding company whose main office is in Wilmington, Delaware.

Rate Base

Respondent owns a steam-generating plant, known as the Brookside plant, located in the borough of Dalton, Lackawanna county, along the south branch of Tunkhannock creek. Equipment in this plant includes five Heine water tube boilers of 1,945 horsepower totaled rated capacity, and four turbo-generators of a total installed generating capacity of 6,500 kilowatts. One turbo-generator of 3,000-kilowatt rating was installed in 1935; two of 500-kilowatt rating each, in 1925; and one of 2,500-kilowatt rating was installed in 1917. All are 60-cycle except the 2,500-kilowatt generator which is 25 cycle and is limited by frequency changer capacity to 1,250 kilowatts. Respondent's engineers reported on the Dalton plant as follows:

"When compared with modern steam-generating station capacity and operating results, the Dalton plant is a relatively small and inefficient unit. In view of the size and character of the property, however, the plant has been maintained in fair operating condition and provides a source of power supply at production costs that are probably below the costs of obtaining power from other available sources."

Respondent also owns one transmission and seven distribution substations of a total capacity of 5,975 kilovolt amperes. It has two 33,000-volt transmission lines on private rights of way. One line is 27.9 miles long and the other is 6.3 miles long. Respondent's engineers state that many of the poles and cross arms on the longer line will have to be replaced in the next several years. Respondent owns approximately 13 miles of distribution feeder lines, and 198.65 miles of distribution pole lines, of which 180.96 miles are classified as rural lines.

During the period from 1921 until

1932, respondent owned no generating system of its own, but purchased power from the Dalton Street Railway Company. In 1932, the Public Service Commission, at A. 21835, approved the acquisition of the Brookside plant from the Dalton Street Railway Company. A witness for respondent testified that, after the acquisition of this plant, the load of the Dalton Street Railway Company, which averaged 1,000-kilowatts to to 1,200 kilowatts was lost, and respondent supplied its own load of from 800 kilowatts to 1,000 kilowatts from the plant of approximately 5,000-kilowatt capacity. In 1934, respondent entered into an agreement with Northern Pennsylvania Power Company to supply not to exceed 2,000 killowatts of firm energy to that utility. The contracts with Northern Pennsylvania Power Company will be discussed hereinafter.

Witnesses for respondent put into the record testimony as to the reproduction cost, new and depreciated, of plant used and useful in the public service at June 30, 1937, which is summarized as follows:

	Reproduction Cost New	Reproduction Cost Depreciated
Organization	$24,299	$24,299
Production plant	876,111	640,645
Transmission plant	182,930	142,185
Distribution plant	670,378	594,102
General plant	42,053	35,162
Subtotal	$1,795,771	$1,436,393
Cost of financing	98,767	79,002
Total	$1,894,538	$1,515,395

The following percentages of new direct cost were added as general overheads, allocated to direct costs, according to the witness in a more or less arbitrary manner:

	%
Organization	1½
Injuries and damages	1
Engineering and supervision	4½
General administrative	2
Insurance	¾
Later expenditures during construction	½
Taxes during construction	¼
Interest during construction	3
Total	13½

Witness Seelye, for respondent, testified that a field inspection was made of the physical property and its condition noted. The word "condition," he stated, was intended to include all matters which lead to ultimate retirement of the property; that is to say, wear and tear, adequacy, or over adequacy, obsolescence, requirements of public authority, and all improvements which may ultimately remove property from service. The condition of the generating plant was determined to be 73 per cent, which, according to the witness, would be practically inoperable (i. e., unfit for use), except that a large amount is included for obsolescence.

This witness testified that accurate age and life studies of the property could not be developed. On the basis of available records and from conversations with old employees, his estimate was that the average age was thirteen and one-half years.

Respondent's Exhibit No. 1, which presented the reproduction cost above summarized contains the following statement in regard to depreciation:

"Our estimate of accrued depreciation reflects our judgment relative to observed physical condition and represents the minimum amount, on the unit cost basis used in our estimate which, in our judgment, should be in a reserve to provide for property renewals and replacements not ordina-

rily made through current maintenance as a part of operating expense. This minimum provision does not, however, recognize obsolescence which is not observable at any given date. In most instances, the major factors to be considered—inadequacy and obsolescence—can be anticipated only to a very limited extent, and prudent management demands there should be in reserve a reasonable amount in excess of observable requirements."

An engineering witness for the Commission also presented testimony as to the reproduction cost, new and depreciated, of respondent's plant at June 30, 1937, which is summarized as follows:

Plant	Reproduction Cost New	Reproduction Cost Depreciated
Intangible	$24,000	$24,000
Production	782,697	330,515
Transmission	165,874	89,977
Distribution	627,989	433,245
General	40,270	25,931
Total	$1,640,830	$903,668

In preparing this computation, no allowance was made for omissions and contingencies on land. On other accounts, such allowance was included in direct costs. Other overheads added to new direct costs were computed on land and land rights, and on other property, as follows:

	Overhead % on Land and Land Rights	Overhead % on Other Property
Engineering and supervision	2	4½
General administration	1	2
Law expenditures	½	½
Injuries and damages		1
Taxes	¼	¼
Interest	6	3
Cost of financing	3	3
Total	12¾	14¼

The engineering witness for respondent included elements of field office and supervision expense in direct cost, but the Commission engineer did not. Most of the difference in these estimates of value, however, lies in the amounts estimated for accrued depreciation. The witness for the Commission testified that he had considered the data in the record at A. 21835, which had been made a part of this record. From this and other records of respondent, he estimated that the average age of the plant was sixteen and three-tenths years and the average life expectancy thirty-six and one-half years. The life estimates were based on the witness' best judgment, and depreciation was calculated on a straight line basis, without consideration of salvage.

In our opinion, the foregoing is another example of the inherent evils of the use of reproduction value in a rate base. In this instance, in a relatively small property, which could be reproduced new for a maximum of $1,900,000, with the same facts available to both, and using the same inventory of property, two reputable and well-qualified witnesses produced estimates of reproduction cost depreciated which vary by an amount in excess of $600,000. This variation in estimate is approximately 30 per cent of the maximum reproduction cost new, and 40 per cent of the maximum depreciated reproduction cost estimate. The depreciated reproduction cost estimate of Day & Zimmermann, Inc., is 167 per cent of the estimate of the engineer for the Commission.

[1] After full consideration of the estimates of reproduction cost, we find those estimates unsatisfactory and conjectural and will, therefore, base our decision in this case upon a rate base

calculated upon historical cost. We find support for this decision in recent decisions of the U. S. Supreme Court. By its decision delivered April 17, 1939, in the case of Driscoll v. Edison Light & P. Co. — U. S. —, 83 L. ed. —, 28 P.U.R.(N.S.) 65, 59 S. Ct. 715, the court reversed the decision of a lower Federal court which had granted a permanent injunction against the imposition of temporary rates by the Pennsylvania Public Utility Commission. Although the formula for fixing utility rates promulgated in Smyth v. Ames (1898) 169 U. S. 466, 42 L. ed. 819, 18 S. Ct. 418, had been followed by the Commission, Mr. Justice Frankfurter, concurring, stated:

"The court's opinion appears to give new vitality needlessly to the mischievous formula for fixing utility rates in Smyth v. Ames (1898) 169 U. S. 466, 42 L. ed. 819, 18 S. Ct. 418. The force of reason, confirmed by events, has gradually been rendering that formula moribund by revealing it to be useless as a guide for adjudication."

The Supreme Court had said, in part, in its decision in California R. Commission v. Pacific Gas & E. Co. (1938) 302 U. S. 388, 397, 82 L. ed. 319, 21 P.U.R.(N.S.) 480, 486, 58 S. Ct. 334:

"There is no principle of due process which requires the rate-making body to base its decision as to value, or anything else, upon conjectural and unsatisfactory estimates. . . . Minnesota Rate Cases (1913) 230 U. S. 352, 452, 57 L. ed. 1511, 1563, 33 S. Ct. 729, 48 L.R.A.(N.S.) 1151, Ann. Cas. 1916A, 18; Los Angeles Gas & E. Corp. v. California R. Commission, 289 U. S. 287, 77 L. ed. 1180, P.U.R. 1933C, 229, 53 S. Ct. 637; Lindheimer v. Illinois Bell Teleph. Co. (1934) 292 U. S. 151, 163, 78 L. ed. 1182, 1190, 3 P.U.R.(N.S.) 337, 54 S. Ct. 658."

The witness for the respondent, who testified as to the reproduction cost of the plant, placed of record an estimate of historical cost at June 30, 1937. A Commission accountant testified as to original cost of plant as of December 31, 1937. Both estimates have been carried forward to December 31, 1938.

Respondent's witness testified that the estimated original cost of property, used and useful, at June 30, 1937, was $1,437,369, classified as follows:

Plant	
Intangible	$19,693
Production	552,765
Transmission and distribution	823,133
General	41,778
Total	$1,437,369

Book cost of additions to December 31, 1938, was $65,553, and book value of retirements was $79,661. These retirements, however, included approximately $50,000 for items not considered used and useful in the original estimate, and an amount of $34,996 was calculated to be the original cost of property retired. Thus, the estimated original cost of respondent's plant at December 31, 1938, was computed to be $1,467,926.

Respondent had no book records of its own prior to 1927, and its witness testified that it was difficult to identify from the records units of property installed since that date. Accordingly, this witness developed the historical cost of items in the inventory of property, using what was stated to be the

best information available as to dates of installation. There is no indication in the record as to the overhead percentages applied to direct costs in these computations.

The accounting witness for the Commission found the same condition as to records. His estimate of original cost was based upon the values recorded on respondent's books with certain adjustments. The first of these adjustments was occasioned by a study of respondent's State Capital Stock Tax Reports, which indicated that, prior to December 31, 1922, the amount of $32,944 may have been expended for property not recorded on the company's books. The second adjustment was in connection with the acquisition of the Brookside plant. The recorded book cost of this plant was $250,000, and an additional sum of $187,399 was expended for rehabilitation of the property. The record at A. 21835 contains an inventory, setting forth that the original cost of the property purchased was $492,631. Accordingly, an amount of $55,232 is added to respondent's book cost to reflect the original cost of this property when first devoted to the public service. Testimony was given by an engineering witness for the Commission that items included in the original cost estimate of the Brookside plant at an amount of $131,799 were no longer used or useful, and that only $25,780 had been deducted from book value of property in the retirement of certain of these items.

Original cost of property at December 31, 1937, as presented by witnesses for the Commission, is thus summarized in the following:

Book value, December 31, 1937		$1,067,055
Add—Additional cost prior to 1923	$32,944	
Additional cost of Brookside Plant	55,233	
		88,177
Total		$1,155,232
Less—Remainder of original cost of property not used or useful, not retired on books		106,019
Estimated original cost, December 31, 1937		$1,049,213

In adjusting this figure to December 31, 1938, the cost of additions, per books, is $42,472. Of the book value of retirements, $70,055, however, $51,493 had previously been considered in the retirement of property not used or useful. The estimated original cost at December 31, 1938, therefore, is stated at $1,073,123.

The record indicates that considerable difficulty was experienced in identifying items of property included in respondent's original cost exhibit with items in the inventory of property purchased from Dalton Street Railway Company. A comparison indicates, however, that the method of estimating original cost followed by the respondent resulted in unit costs, in many cases, much higher than those shown in the inventory of property purchased. We do not feel that these differences can be accounted for merely by changes in accessory equipment since the original inventory was made.

We are of the opinion that neither the original cost estimate of the respondent nor that of the Commission witness can be accepted without reservation. Respondent is now engaged in studies incident to the determination of the original cost of its properties pursuant to the provisions of the applicable Uniform System of Accounts and, pending completion of

these studies and their review by our technical bureaus, we find, after a careful review of all the evidence before us, that the original cost of respondent's property will not exceed $1,300,000, and, accordingly, this sum will be included in the rate base.

[2, 3] Respondent's witness testified that, based upon two months' operating expenses, and including an inventory of revenue merchandise of $7,000, working capital requirements are $50,000. In our opinion, ratepayers should not be burdened by paying a return on capital invested in merchandise. Under the provisions of § 912 of the Public Utility Law, those utilities engaged in the manufacture, sale, or lease of any appliance or equipment are required to keep accounts for property used in this connection and revenues and expenses of such operations separate from those used in or arising from the rendering of service. We, therefore, exclude the value of merchandise inventory from working capital. In accordance with our practice in cases where revenue is collected within approximately forty-five days, as in the present case, we will allow working capital representing operating expense for one and one-half months, in the amount of $35,000.

[4] Respondent claims $100,000 for going concern value based on the following factors claimed by it: continual expansion, simple capital structure, satisfactory credit position, and adequacy of physical property. Without expressing an opinion as to the relative importance of these factors, we find that no evidence was introduced and no claim was made for "lag" in earnings. Lag is an essential element in a determination of going concern value (Chambersburg Gas Co. v. Public Service Commission [1935] 116 Pa. Super. Ct. 196, 7 P.U.R.(N.S.) 359, 176 Atl. 794). We conclude that there is no reasonable or proper basis shown by the record for an allowance for going concern value.

[5] Respondent has, as of December 31, 1938, received contributions in aid of construction amounting to $3,481, representing property in respondent's fixed capital accounts, the cost of which had been provided by the customers themselves. It would be manifestly unfair to allow a utility company to earn a return upon property paid for by its consumers. For this reason, we deduct contributions in aid of construction from the cost of property included in the rate base.

In accordance with the foregoing, we find that a fair, reasonable, and proper rate base or value, as of December 31, 1938, may be determined as follows:

Estimated original cost of property	$1,300,000
Allowance for working capital	35,000
Total	$1,335,000
Less—Contributions in aid of construction	3,481
Remainder	$1,331,519
Rounded to	$1,330,000

[6] Respondent made a claim for an allowable rate of return of 7 per cent, but presented little or no evidence to substantiate its contention. A witness for the Commission testified at length as to money and interest rates, bond prices and yields, and earnings on common capital stock. Respondent has no preferred capital stock outstanding, and no funded debt. At December 31, 1938, it owed its parent

company $590,000, on which it paid interest at the rate of 5 per cent, and it paid dividends on its common capital stock in 1938 aggregating 25 per cent of the stated value thereof. After consideration of all the evidence, we determine that the allowable rate of return to this respondent under present economic conditions is 6 per cent, and the allowable return on the foregoing rate base is $79,800 per annum.

Gross operating revenues for the year 1938 amounted to $322,871. Operating expenses for 1938 aggregated $235,262, upon which we make the following findings:

[7] Provision for depreciation was calculated in the amount of $48,312. Since we have included the original cost of the property in the rate base without deduction for accrued depreciation, it is our opinion that the annual provision for depreciation should be made on the sinking-fund basis. In previous orders we have stated that the original or historical cost rate base represents an amount of dollars prudently invested, and is not subject to deductions on account of depreciation on the property in which those dollars were placed. This assurance of equity to the investor is concomitant with a like assurance to the ratepayer, in that he is charged, as depreciation expense, with only that amount which, when invested, either in the plant of the utility, or otherwise, will return the investment at the end of the life of the property.

In the present case, we find that future provision for depreciation should be made on a 4 per cent sinking-fund basis. A witness for the Commission testified that the aggregate estimated life of the plant was thirty-six and one-half years, which we will round to an estimate of average service life of thirty-five years, and, upon this basis, we determine that the annual allowance for depreciation is $17,582.

[8] Operating expenses for the year 1938 include the amount of $5,318, designated as rate case expense in the instant proceeding. Since expenses of this nature are nonrecurring and since the rates defended by respondent produce an excessive return, we are of the opinion that these expenses should not be included in allowable operating expenses.

Respondent paid to Republic Service Management Company, an affiliated company, $7,729, or slightly in excess of 2 per cent of its gross revenues, as management and engineering fees. Of this amount $800 was charged to construction and the remainder to operating expense. Respondent introduced testimony to show that this fee is based on actual cost to the management company and is prorated in as equitable a manner as is possible.

We find that the return earned for the year 1938 is as follows:

Gross operating revenue		$322,871
Operating expenses (exclusive of provision for depreciation and rate case expenses)	$181,632	
Provision for depreciation	17,582	
		199,214
Net operating revenue		$123,657
Allowable return		79,800
Excess return for 1938		$43,857

[9] We take judicial notice of a fact submitted by respondent after the record in this proceeding was closed, namely, that the cost of anthracite fuel has increased approximately 50 cents a long ton over the cost of fuel used in 1938, and that, on the basis of approximately 22,000 long tons con-

sumed in 1938, its fuel costs for 1939 would be increased by $11,000. Accordingly, we conclude that on the basis of operations during 1938, respondent's net operating revenues for 1939 will be approximately $32,850 in excess of an allowable return.

After study of respondent's tariff Pa. P. U. C. No. 10, and of consumer consumption data furnished by respondent of customer usage during 1938, the Commission finds that certain schedules set forth in that tariff should be amended in the following manner:

SCHEDULE "A."

Residential Lighting and Domestic Service

The rates under this schedule shall be changed to the following:

Minimum billing 75¢ per month.

First 30 kw. hr. at 7½¢ per kw. hr.
Next 30 kw. hr. at 5½¢ per kw. hr.
Next 60 kw. hr. at 4¢ per kw. hr.
Next 80 kw. hr. at 3½¢ per kw. hr.

Excess usage at 3¢ per kw. hr.

Provision for increase in first step for demand in excess of 2 kilowatts shall be eliminated.

SCHEDULE "AS."

Seasonal Lighting and Domestic Service

This schedule is to be withdrawn and service furnished under Schedule "A."

SCHEDULE "AC."

Cooking, Lighting, and Domestic Service

This schedule is to be withdrawn and service furnished under Schedule "A."

SCHEDULE "ASC"

Seasonal Cooking, Lighting, and Domestic Service

This schedule is to be withdrawn and service furnished under Schedule "A."

SCHEDULE "B."

Commercial Lighting

The rates under this schedule should be changed to the following:

Minimum billing 75¢ per month.

First 30 kw. hr. at 7½¢ per kw. hr.
Next 170 kw. hr. at 6¢ per kw. hr.
Next 300 kw. hr. at 5¢ per kw. hr.
Next 500 kw. hr. at 4¢ per kw. hr.

Excess usage at 2½¢ per kw. hr.

SCHEDULE "C"

Domestic Heating and Cooking

This schedule has been restricted since September 15, 1934. After May 15, 1941, service under this schedule shall be discontinued and all customers under this schedule at that date shall be furnished service under Schedule "A."

Respondent will be required to submit monthly statements of its operating revenues, showing the effect of the above-ordered reductions. It is our purpose to ensure that customers of public utilities of this commonwealth not only are charged at reasonable and just rates, but that, if possible, rates shall be progressively decreased as operating experience will permit. We believe that the foregoing rates will have a promotional effect, and that not all the reduction in gross revenue contemplated will be experienced by the respondent. As the determination of actual operating experience under these rates warrant, we shall expect the respondent to make further reductions in rates.

The Commission having found, after full consideration of the matters and things involved, that the rates contained in respondent's Tariff Pa. P. U. C. No. 10 are unfair, unjust, and unreasonable, and produce an excessive return; therefore,

Now, to wit, May 2, 1939, it is *ordered:* That, unless exceptions are filed hereto by Abington Electric Company, respondent, within fifteen days after the date of service of this order nisi, this order shall become the final order in this proceeding.

It is *ordered nisi:* That Abington Electric Company file, within fifteen days from the date of service of this order, a new tariff containing the changes in its rates set forth in the foregoing report and producing a re-

duction of approximately $30,000 in its annual gross revenue; said tariff to be effective for all billings after May 15, 1939.

It is *further ordered nisi:* That Abington Electric Company file with the Commission, on or before the 15th day of each month, a statement of its revenues and expenses for the preceding month, classified by prescribed accounts; the operating revenues to be further classified by tariff schedule.

PENNSYLVANIA SUPERIOR COURT

Bell Telephone Company of Pennsylvania

v.

Pennsylvania Public Utility Commission

(— Pa. Super. Ct. —, 5 A. (2d) 410.)

Discrimination, § 181 — Rates — Telephone tolls — Interstate and intrastate.

1. The statute prohibiting discrimination in rates by a telephone company extends to and covers unreasonable discrimination against customers of the utility whose toll service is intrastate and in favor of those whose toll service is interstate, p. 271.

Discrimination, § 181 — Connecting telephone companies — Interstate and intrastate service.

2. The relation between an interstate telephone company and an affiliated intrastate company and the use of the facilities, exchanges, and wires of the state company by the interstate company in the transmission of its business, being different from mere stock ownership, justifies a ruling that the intrastate service and patrons of the state company shall not be unreasonably discriminated against to the advantage of those using the same facilities, in addition to other facilities of the connecting company, in interstate service, p. 272.

Discrimination, § 181 — Telephone rates — Interstate and intrastate service.

3. That interstate telephone calls involve more service and equipment than intrastate calls, and use the same service and equipment involved in intrastate calls, in the same direction, could not justify a greater charge for intrastate than for interstate calls, p. 272.

Interstate commerce, § 79 — Power of states — Intrastate telephone rates.

4. A state, by its regulatory body, has the power to fix an intrastate rate by using the standards adopted for interstate rates, provided it does not result in hindrance to, interference with, or regulation of, interstate commerce, p. 274.

Discrimination, § 14 — Rates — Reasonableness.

5. Unjust discrimination may exist even though the preferential and prejudicial rates are not shown to be unreasonable, p. 274.

Rates, § 32 — Jurisdiction of Commission — Scope.

6. The Commission has general and plenary jurisdiction over intrastate rates, being limited only by the constitutional requirements that they be not unreasonable or confiscatory and do not result in discrimination against interstate traffic, over which the Commission has no jurisdiction, p. 275.

Rates, § 190 — Presumptions — Order of Federal Commission.

7. The courts must assume, in the absence of proof to the contrary, that rates voluntarily established by a telephone company and approved by the Federal Communications Commission are just, fair, and reasonable to the utility as well as to the public since that Commission has no power or authority to impose an interstate rate on a utility company which would cause an unjust or unreasonable discrimination against intrastate traffic, p. 276.

Discrimination, § 11 — Powers of Commission — Interstate and intrastate rates.

8. The Commission has power to order a reduction of intrastate rates to conform with the just and reasonable rates established for interstate service if an unjust and unreasonable discrimination against intrastate service exists which can be corrected only by such a reduction, p. 277.

[April 12, 1939.]

APPEAL *from order of Commission directing revision of intrastate toll rates; appeal dismissed and order affirmed. For Commission decision, see 23 P.U.R.(N.S.) 173.*

APPEARANCES: William H. Lamb and Benjamin O. Frick, both of Philadelphia, for appellant; A. Jere Creskoff, Special Counsel, of Philadelphia, and Harry H. Frank, Assistant Counsel, and Edward Knuff, Counsel, both of Harrisburg, for appellee.

KELLER, P. J.: This is an appeal by The Bell Telephone Company of Pennsylvania (hereinafter called Bell Company), from an order of the Pennsylvania Public Utility Commission directing it to revise its intrastate toll rates for distances exceeding 36 miles so as to conform to the rates charged by American Telephone and Telegraph Company (hereinafter called American Company), using appellant's facilities, for service over comparable distances in interstate service.

The order was based on a finding of the Commission, made after a full and extended hearing, that the toll rates charged by the appellant company for long-distance service within the state of Pennsylvania were higher than the interstate rates, using the same facilities, for a like or even greater distance, and constituted unreasonable discrimination against intrastate patrons, in violation of § 304 of the Public Utility Law of May 28, 1937. P. L. 1053, 66 P. S. § 1144.

At the outset it may be stated that the appellant, both in its oral argument and in its reply brief, expressly disclaimed raising the question of *confiscation*. See Portland R. Light & P. Co. v. Oregon R. Commission (1913) 229 U. S. 397, 413, 57 L. ed. 1248, 33 S. Ct. 820; Lehigh & N. E. R. Co. v. Public Service Commission (1922) 79 Pa. Super. Ct. 540, affirmed

in 277 Pa. 493, P.U.R.1923E, 360, 121 Atl. 205. It contended that the order was (1) without support in the evidence; and (2), therefore, arbitrary; and (3), in consequence, deprives it of its property without due process of law in violation of the Fourteenth Amendment; and (4) constitutes an interference with interstate commerce. Its argument may be boiled down, therefore, to (1) a denial of unreasonable discrimination against intrastate service or patrons and (2) an averment that the order of the Commission interferes with interstate commerce; for if the Commission's finding of unreasonable discrimination is sustained by competent evidence, the contention that appellant is deprived of its property without due process of law, in view of its express disclaimer that the order is confiscatory, must fall.

The Bell Company furnishes statewide telephone service to the public in Pennsylvania. It has no property or facilities outside the state of Pennsylvania, but by connections with American Company and other telephone companies, owned or controlled by American Company, it furnishes its subscribers and patrons with nationwide telephone service and even telephone service to distant lands. All of its common stock ($110,000,000) is owned by American Company. A dividend of 8 per cent per annum is paid on the common stock. Its 6½ per cent preferred (nonvoting) stock ($20,000,000), is in the hands of the investing public and commands a high premium.

American Company does no local business in Pennsylvania. It has no lines here used in local telephone service. It has long-distance lines in Pennsylvania, which it uses for interstate service, and two long-distance boards or exchanges—one in Philadelphia and one in Pittsburgh—but it does not perform any service between terminals wholly in Pennsylvania. Its poles, lines, and cables in the state are usually owned jointly with the Bell Company, and the exchanges, lines, and individual facilities of the latter are always used in connecting a local subscriber in Pennsylvania with an American Company interstate long-distance call. All of the American Company's interstate calls in Pennsylvania must go through Bell Company's exchanges and lines. Bell Company makes no separation in its accounts between the cost of exchange or subscriber service and toll service, or of the cost of the use of its facilities by American Company. No separate valuation of toll property and local service property is kept. The relationship between the two companies is not merely that of parent and child, or holding company and subsidiary. It is much closer and more intricate. While most of Bell Company's separate business is intrastate, it is not wholly so. In connection with New Jersey Bell Telephone Company, Diamond State Telephone Company, and perhaps some other American Company subsidiaries, by agreement with the American Company, it does some interstate telephone service without using any of American Company's cables or wires. For example, service between Philadelphia, Pa., and Camden, N. J., is directly accomplished between Bell Company and New Jersey Bell Telephone Company and no facilities of American Company are used. Such

service, where it exists, is classified as (1) under license contracts, or (2) between privilege points, the former being less subject to change by American Company than the latter.

As a result of certain investigations instituted by Federal Communications Commission with respect to the long line telephone rates of American Company *and that Commission's insistence on their substantial reduction,* American Company filed a new schedule of rates, which was approved by Federal Communications Commission, effective January 15, 1937, which called for a reduction of about $12,000,000 yearly from its previous rates. As a matter of fact, the gross revenue of the American Company was not reduced under the new schedule by anything near $12,000,000. As is often the case, additional business was received under the lower rate to make up for a considerable part of the reduction, but, because of increase in expenses, etc., there was a substantial reduction of net income.

In putting into effect the new rates American Company lowered its toll rates for distances in excess of 36 miles, and arranged for a like reduction in all interstate business of Bell Company with respect to calls put through at privilege points and where direct connection was made at certain other points without using any facilities of American Company. For example, the station to station, three minute, call between Harrisburg, Pa., and Camden, N. J., which had been 60 cents was reduced to 55 cents. Between Johnstown, Pa., and Camden, N. J., for the same kind of call, the rate was reduced from $1.05 to 85 cents; from Pittsburgh, Pa., to Camden, N. J., the rate was reduced from $1.15 to $1. This was done to "carry out the arrangement by the Federal Communications Commission" (p. 95a).

Since 1920, when any reductions had been made by American Company in its interstate rates and reflected in its interstate tolls, corresponding reductions were always made by Bell Company in its intrastate toll rates for comparable distances. This happened frequently—"practically every year for the last five or six years" prior to November, 1937—and every time a change was made interstate, Bell Company conformed as to intrastate toll rates (p. 139a). But as to the change made by the schedule effective January 15, 1937, Bell Company did not conform its intrastate toll rates. In one rate only was the Bell Company's toll rate lower than American Company's. For local calls, not more than 6 miles, Bell Company's rate has been 5 cents, while American Company's lowest rate is 10 cents for a distance not exceeding 12 miles. Bell Company made no change in this respect either. Its assistant vice president, in charge of rates, rules, and regulations connected with the furnishing of telephone service, testifying as a witness for the appellant, stated that he would not recommend such an increase; possibly because in the long run it would not prove profitable. Appellant's testimony showed that 30 per cent of all its toll messages, that is 22,914,874 out of 75,940,870, for the year 1936, were for distances of 6 miles or less, and 93½ per cent were for distances less than 42 miles.

The reason given by Bell Company for not conforming its intrastate toll rates to the interstate toll rates arranged for by American Company effective January 15, 1937, was that after consultation with the Public Service Commission of Pennsylvania, the predecessor of the present Public Utility Commission, in December, 1936, it had made a reduction of its local or residence exchange rates, effective as to billings February 1, 1937, entailing a yearly reduction of $1,800,000, and that the company could not afford a further reduction, which it was estimated would amount to $600,000 gross, or $463,000 net, a year, or 42/100 of one per cent on its common stock. But it was brought out on the examination of appellant's witnesses, on November 16, 1937, that the actual receipts for the first ten months of 1937 plus the estimated receipts for November and December of that year showed gross receipts of $69,118,769, as against $65,510,510 in 1936 and net receipts of $16,203,805, as against net receipts of $16,139,990 in 1936, so that notwithstanding considerable increases in wages, taxes, etc., both gross and net revenues had increased in 1937, the gross local service revenues, affected by the reduction having increased nearly two million dollars, and the actual revenues for local service for the first ten months of 1937 being more than 86 per cent of such revenues for the whole year 1936. It is only fair to state that at the argument it was said that the actual receipts for November and December, 1937, had fallen below the estimated revenues, but it is a well-known fact, of which we can take judicial notice, that there was a sharp and sudden business slump, recession, or depression—whatever you choose to call it—beginning November, 1937, which was largely responsible for this decline from estimated revenues and that the reduction of net revenue in 1937 below that of 1936 cannot be laid to the door of the reduction of local exchange rates. The apparent reduction was more than made up by the increased traffic.

The concrete result of the refusal of Bell Company to conform its intrastate rates with the interstate rates arranged for it by American Company is best shown by specific instances of the discrimination resulting therefrom against intrastate patrons or service, taken from complainants' "Exhibit No. 4" (p. 289a) as checked and corrected by appellant.

This difference ranging from 5 cents to 20 cents in favor of interstate calls is increased when applied to person to person calls and conversations for over three minutes. The overtime rate, when the initial period rate is 55 cents, is 15 cents for each additional minute, and when the initial period rate is 60 cents, the overtime rate is 20 cents per minute, so that a 5-minute station to station call from Harrisburg to Camden costs 85 cents, while a 5-minute station to station call from Harrisburg to Philadelphia costs $1.

Comparison of 3-minute initial period station-to-station intrastate toll rates with rates for interstate messages

BETWEEN	Mileage	Rate	AND	Mileage	Rate Prior to 1/15/37	Rate Effective 1/15/37
		and Philadelphia			Camden, N. J. (Interstate)	
Coatesville	36	$ .30		36	$ .30	$ .30
Harrisburg	98	.60		98	.60	.55
Johnstown	205	1.05		205	1.05	.85
Pittsburgh	267	1.15		267	1.15	1.00
Beaver Falls	280	1.20		280	1.20	1.00
		New Castle, Pa.	AND		Youngstown, Ohio	
Wilkes-Barre	251	1.10		252	1.10	.95
Lancaster	225	1.10		240	1.10	.90
Harrisburg	191	1.00		205	1.05	.85
		Midland, Pa.	AND		E. Liverpool, Ohio	
Scranton	261	1.15		267	1.15	1.00
Harrisburg	190	1.00		197	1.00	.80
Pottstown	254	1.15		261	1.15	1.00
		Easton Pa.	AND		Phillipsburg, N. J.	
Altoona	175	.95		175	.95	.75
Washington, Pa.	275	1.20		275	1.20	1.00
Harrisburg	98	.60		98	.60	.55
		Matamoras, Pa.	AND		Port Jervis, N. Y.	
Erie	288	1.20		288	1.20	1.05
New Castle	300	1.25		300	1.25	1.05
Harrisburg	139	.75		139	.75	.65
		Warren, Pa.	AND		Jamestown, N. Y.	
Harrisburg	164	.90		177	.95	.75
Chambersburg	154	.85		169	.90	.75
Johnstown	111	.70		127	.75	.60
		Sayre, Pa.	AND		Elmira, N. Y.	
Harrisburg	120	.70		128	.75	.60
Philadelphia	159	.85		174	.85	.75
York	142	.80		152	.85	.70

Taking as an example Harrisburg to Philadelphia and Harrisburg to Camden, it must be remembered that the call to Camden, N. J., uses precisely the same exchanges, lines, facilities, etc., as the call to Philadelphia, and in addition requires connection with another exchange and the use of facilities of New Jersey Bell Telephone Company at Camden—for which by itself a charge of 5 cents is made, divided between Bell Company and New Jersey Bell Telephone Company—and notwithstanding this additional service and the payment to the connecting company of part of the charge, the interstate rate is 5 cents less than the intrastate rate over the same line, in the same direction, which uses a part, but not all, of the same facilities and service.

This discrimination against intrastate service in Pennsylvania led the Public Utility Commission of its own motion to bring this proceeding against Bell Company as respondent, which resulted in the order appealed from.

We think the evidence in the case justified the finding by the Commission of unreasonable discrimination on the part of Bell Company, and that the order is not unreasonable or arbitrary.

[1] I. Preliminarily, we may say, we do not agree with the learned coun-

sel for appellant as to the construction to be placed on § 304 of the Public Utility Law, *supra,* forbidding any public utility from making or granting any unreasonable preference or advantage to any person, corporation, or municipal corporation, or subjecting any person, corporation, or municipal corporation to any unreasonable prejudice or disadvantage; and forbidding any public utility from establishing or maintaining any unreasonable difference as to rates, either as between localities or as between classes of service. The section specifically provides that "unless specially authorized by the Commission, no public utility shall make, demand, or receive any greater rate in the aggregate for . . . the transmission of any message or conversation for a shorter than for a longer distance over the same line or route in the same direction, the shorter being included within the longer distance." We do not understand that the provision of § 304 against any unreasonable discrimination in preferential treatment, rates, etc., is limited to advantages in favor of, or disadvantages against, *particular individuals,* whether persons or corporations. In our opinion, it extends to *classes* of persons, etc., affected by such discrimination, even though such classes are not fixed and may change from time to time. The prohibition extends to and covers unreasonable discrimination against customers or patrons of the utility whose toll service is intrastate, and in favor of those whose toll service is interstate. Furthermore, we think the present case comes expressly within the prohibition against establishing or maintaining any unreasonable difference as to rates "between classes of service"; and the section is specially applicable where, as here, the utility is demanding and receiving a greater rate for the transmission of a "message or conversation for a shorter than for a longer distance, over the same line or route in the same direction, the shorter being included within the longer distance." We have no doubt as to the application of § 304 to the case in hand.

[2, 3] We agree with the propositions of appellant that the mere fact that the rates of another company are different from those of appellant does not constitute discrimination at all; and that even where the rates are those of the same company, a mere difference in statewide and nationwide scales, of itself, would not support a finding of discrimination. But those propositions do not rule this case. Nor is the order in this case based on 100 per cent ownership of Bell Company's stock by American Company. Mere stock ownership does not justify disregarding corporate identity or making one company's acts applicable to another; and appellant admits (pp. 27, 28) that there is nothing in the Commission's report and order to indicate that it relied on any such proposition.

But the relation between these two companies and the use of the facilities, exchanges, and wires of Bell Company by American Company in the transmission of its business, is different from mere stock ownership, and justifies the Commission in its ruling that the intrastate service and patrons of Bell Company, which are under its supervision and regulation, shall not be unreasonably discriminated against to the advantage of those using the same facilities, in addition to other fa-

cilities of a connecting company, in interstate service. While the *form* of the order is that appellant revise its intrastate rates "to conform to the rates charged by American Telephone and Telegraph Company for service over comparable distances," its actual effect, as indicated in the report and argued by its counsel, is that appellant revise its rates for wholly intrastate service to conform to its rates, for comparable distances, charged for interstate service, which includes the very same service and facilities used in intrastate service; in other words that appellant shall not charge more for intrastate service than it charges for precisely the same service, plus the additional service furnished by a connecting company, in interstate service. Appellant argues that a difference in rates for similar services may be justified by a difference in circumstances. This is correct, but the argument does not help appellant. There *is* a difference here in circumstances—the interstate calls involve *more* service and equipment than the intrastate calls, and use the same service and equipment involved in intrastate calls, in the same direction. This difference would justify a greater charge for the interstate than the intrastate calls; it could not, however, justify a greater charge for the intrastate calls, which are the calls involved in this appeal. The order in the present case was based on the fact that no special circumstances were shown by appellant justifying such discrimination, and it was, therefore, unreasonable. This fact renders this case easily distinguishable from the case of Louisville & N. R. Co. v. Eubank (1902) 184 U. S. 27, 46 L. ed. 416, 22 S. Ct. 277, 283, which is relied on by appellant. That case did not involve an appeal from an order of the Railroad Commission of Kentucky fixing intrastate rates, but was from a judgment obtained by Eubank in an action in a state court against the railroad company, based on § 218 of the Constitution of Kentucky, providing that it shall be unlawful for a railroad company to charge or receive any greater compensation in the aggregate for the transportation of passengers or freight, under substantially similar circumstances and conditions, for a shorter than for a longer distance over the same line, in the same direction, the shorter being included within the longer distance; provided that in special cases, the Railroad Commission may authorize this to be done. Eubank, who shipped tobacco from Franklin, Ky., to Louisville, Ky., a distance of 134 miles, was required to pay a rate of 25 cents per hundred pounds, while shippers from Nashville, Tenn., to Louisville, Ky., over the same road, a distance of 185 miles, paid only 12 cents per hundred pounds. The suit was brought to recover from the railroad company the difference of 13 cents per hundred pounds on 145,245 pounds shipped by plaintiff. The railroad company, in its answer, averred, inter alia, that the rate of 12 cents per hundred pounds had been made in conformity with the interstate commerce act, duly filed with and approved by the Interstate Commerce Commission; that Nashville was situated on the Cumberland river, navigable by boats plying between Nashville and points on the Ohio river, including Louisville, which transported tobacco from Nashville to Louisville at extremely low rates, and

that if it charged any more than 12 cents per hundred pounds, it could not have secured the transportation of any of said tobacco; that it charged no rate on tobacco to Louisville, Ky., from any point in the state of Kentucky on the same line with Franklin and farther from Louisville than Franklin, less than the 25-cent rate charged from Franklin to Louisville; and that the rate of 25 cents per hundred pounds charged from Franklin to Louisville was lower than its standard tariff rates for that distance, and the less rate resulted from water transportation from Bowling Green, Ky.—which could be reached by wagon from Franklin—to Louisville, but for which it would have demanded and received a much higher rate, which higher rate would have been just and reasonable, and that the rate of 25 cents per hundred pounds was just and reasonable in itself by reason of such competition. The plaintiff, Eubank, demurred to these averments, thereby admitting their truth. In reversing the court below, the majority opinion in the Supreme Court, *supra,* at p. 43 of 184 U. S., said, inter alia: "In the case at bar the state claims only to regulate its local rates by the standard of the interstate rate, and says the former shall be no higher than the latter, but the direct effect of that provision is, as we have seen, to regulate the interstate rate, for to do any interstate business at the local rate is impossible, and if so, it must give up its interstate business or else reduce the local rate in proportion. That very result is a hindrance to an interference with, and a regulation of, commerce between the states, carried on, though it may be, by only a single company." It involved only one specific instance of discrimination in favor of the interstate service, for which there was a reasonable excuse, and did not relate to a general discrimination favoring all interstate points for which there was no reasonable excuse, such as exists here.

[4] Appellant makes the mistake, so often committed in citing opinions, of taking general expressions found in the opinion away from the setting of facts which justifies their use. It is clear from the opinion—even apart from the dissenting opinion of Mr. Justice Brewer, concurred in by Mr. Justice Gray—that there can be no objection to a state, by its regulatory body, fixing an intrastate rate by using the standards adopted for interstate rates, provided it results in no hindrance to, or interference with, or regulation of, interstate commerce.

[5] In Illinois Commerce Commission v. United States (1934) 292 U. S. 474, 483, 485, 487, 78 L. ed. 1371, 54 S. Ct. 783, 787, Mr. Justice Stone, speaking for the court said: "The decision [of the Interstate Commerce Commission] in the first proceeding, that the increase in interstate rates was reasonable, *was made in the hope that the state Commissions would bring intrastate rates into harmony.* When they failed to do so, the Commission reaffirmed its finding that the new interstate rates were reasonable and found that the intrastate rates must be *raised* in order that the intrastate traffic may bear its fair share of the revenue burden. It is plain from the nature of the inquiry that the rate level, to which both classes of traffic were raised, was found reasonable on the basis of the traffic as a whole.

Where the conditions under which interstate and intrastate traffic move are found to be substantially the same with respect to all factors bearing on the reasonableness of the rate, and the two classes are shown to be intimately bound together, there is no occasion to deal with the reasonableness of the intrastate rates more specifically, or to separate intrastate and interstate costs and revenues. . . . Similarly, the finding of unjust discrimination *against* interstate commerce made in the second report rests upon evidence. The effect of maintaining a *lower rate, intrastate,* than the *reasonable interstate rate* is necessarily discriminatory wherever the two classes of traffic, inextricably intermingled, are carried on, as in the district, under substantially the same conditions. . . . There can be no doubt that it was intended to prescribe for all *intrastate traffic* within the district the *same rate as that prescribed for all interstate traffic there,* and that interstate carriers whose rails are confined to either state and which for that reason have filed no interstate switching rates are nevertheless required to adopt the prescribed intrastate rate." (Italics supplied.) See also, Minnesota Rate Cases (1913) 230 U. S. 352, 57 L. ed. 1511, 33 S. Ct. 729, 48 L.R.A. (N.S.) 1151, Ann. Cas. 1916A, 18; Houston, E. & W. Texas R. Co. v. United States (1914) 234 U. S. 342, 357, 58 L. ed. 1341, 34 S. Ct. 833. Unjust discrimination may exist even though the preferential and prejudicial rates are not shown to be unreasonable: United States v. Illinois C. R. Co. (1924) 263 U. S. 515, 524, 68 L. ed. 417, 44 S. Ct. 189.

II. Much of what we have just said is likewise applicable to appellant's second contention, and supports the conclusion that the order of the Commission does not constitute a hindrance to, interference with, or regulation of, interstate commerce; and it must not be forgotten that unless the order has that effect it is not in conflict with the interstate commerce clause of the Federal Constitution. USCA Const. art. 1, § 8, cl. 3.

[6] Many of the cases cited and relied on by appellant on this branch of the case have no application or relevance to this case. For example, Wisconsin R. Commission v. Chicago, B. & Q. R. Co. 257 U. S. 563, 66 L. ed. 371, P.U.R.1922C, 200, 42 S. Ct. 232, 22 A.L.R. 1086, and Florida v. United States (1931) 282 U. S. 194, 75 L. ed. 291, 51 S. Ct. 119, related to orders of the Interstate Commerce Commission which required railroad companies to *increase* their intrastate rates in order not to produce an unjust discrimination against interstate traffic. In the former case the order of the Interstate Commerce Commission was not restricted to points affecting interstate travel, but applied to all intrastate fares, including fares between interior points, although they might not be near the border and might not work a discrimination against interstate travelers at all. In the latter case the order in the Interstate Commerce Commission, *increasing* the intrastate freight on logs, was statewide and applied to parts of Florida which made no shipments of logs in interstate traffic. In both cases the Supreme Court of the United States struck down the orders. But appellant has wholly misunderstood the reasoning in applying them to this case. The In-

terstate Commerce Commission has absolutely no right or authority to interfere with intrastate rates except to prevent an unjust discrimination against *interstate* traffic, and the orders in those cases were struck down by the Supreme Court because they were not restricted to *intrastate rates which produced discrimination against interstate travel or traffic,* as in Houston, E. & W. Texas R. Co. v. United States (the Shreveport Case) *supra,* and Illinois C. R. Co. v. Public Utilities Commission, 245 U. S. 493, 506, 62 L. ed. 425, P.U.R.1918C, 279, 38 S. Ct. 170. It was the *limited* jurisdiction of the Interstate Commerce Commission over intrastate rates which caused the Supreme Court to strike down its orders requiring an increase of all intrastate rates, whether or not they produced discrimination against the interstate traffic, over which it had *general* jurisdiction. But the jurisdiction of the Pennsylvania Public Utility Commission over *intrastate* rates is general and plenary, and is limited only by the constitutional requirements that they be not unreasonable or confiscatory and do not result in discrimination *against* interstate traffic, over which the state Commission has no jurisdiction or supervision at all. Hence its power to issue statewide orders affecting intrastate rates is unquestioned, provided they are not unreasonable, do not amount to confiscation, and do not result in unjust discrimination *against* interstate traffic. The cases in which the Interstate Commerce Commission has ordered a change in intrastate rates in order to prevent discrimination against interstate traffic were all concerned with orders *increasing* intrastate rates so as to make them equal to interstate rates for comparable service. If the interstate rates are themselves just and reasonable and are not below the fair and reasonable rate demandable for the service, by reason of some special circumstance such as was present in the Eubank Case, it is hard to see how there can be any discrimination against interstate traffic and in favor of intrastate traffic by an order of a state Commission directing intrastate rates to conform to interstate rates.

[7] There is absolutely no evidence in this case that the rates of American Company, which by arrangement with the Federal Communications Commission were made applicable to Bell Company's interstate service were not just and reasonable and did not produce a fair and reasonable return to the respective companies for the service performed. While the reduction was voluntary, in the sense that the rates were not imposed by an order of the Federal Communications Commission, they were the result of insistent demands of the Federal Communications Commission that the rates be reduced because they were exorbitant and unjust. We must assume, in the absence of all proof to the contrary, that the rates so established by the American Company and approved by the Federal Communications Commission are just, fair, and reasonable to the utilities as well as to the public; for the Federal Communications Commission has no power or authority to *impose* an interstate rate on a utility company which would cause an unjust or unreasonable discrimination *against* intrastate traffic. The proof is, that since the establishment of the interstate rates effective February 15, 1937,

American Company has continued to pay dividends of 9 per cent per annum on its common stock—(although the report of earnings may show that only 8 per cent and a fraction was currently *earned*) and Bell Company has continued to pay 8 per cent per annum on its common stock, and the evidence of appellant is, that if the lowered rate produces no additional revenue, the net loss in earnings due to the order appealed from would be 42/100 of one per cent on the common stock.

The appellant does not claim that the order results in confiscation of its property; possibly because it does not desire to have the Commission enter upon a valuation of its property, used and useful in the public service, for rate-making purposes.

In the light of the evidence in this record it is idle to suggest, much less to hold, that the order appealed from amounts to regulation of interstate service or rates, or is a hindrance to or interference with interstate telephonic traffic and communication.

[8] Nor is the order invalid because it is not alternative in form, directing appellant either to raise its interstate rates or lower its intrastate rates, to conform. While such alternative form is frequently used, in order to avoid unjust discrimination, where the regulatory body has the power to order either, it is not obligatory, where, as here, the Public Utility Commission has no power to make an order interfering with interstate rates. In the present case there is no alternative open which the Commission may impose on the appellant. If an unjust and unreasonable discrimination against intrastate service exists, which can be corrected only by a reduction of the intrastate rates to conform with the just and reasonable rates established for interstate service, the Public Utility Commission has the power to order it. See Merchants' Warehouse Co. v. United States (1931) 283 U. S. 501, 513, 75 L. ed. 1227, 51 S. Ct. 505; Texas & P. R. Co. v. United States (1933) 289 U. S. 627, 650, 77 L. ed. 1410, 53 S. Ct. 768.

The appeal is dismissed and the order of the Commission is affirmed. Costs to be paid by appellant.

NORTH DAKOTA SUPREME COURT

Devils Lake Steam Laundry

v.

Otter Tail Power Company

[No. 6547.]

(— N. D. —, 284 N. W. 417.)

Rates, § 234 — Filed schedules — Temporary rates.

1. Where the Board of Railroad Commissioners, in the exercise of its

statutory rate-making power, establishes a rate schedule for electrical service provided by a public utility, and where thereafter on application of the utility a lower rate schedule "defined as a temporary rate schedule, to be effective up to and including (a day certain) and to terminate as of that date" is put into effect, upon the expiration of the period covered by the temporary schedule, the general rate schedule theretofore established automatically becomes effective without further action, p. 280.

Rates, § 234 — Schedules — Rate changes — Conditions precedent.

2. Chapter 207, Session Laws 1937, which provides: "No change shall be made by any public utility in any tariffs, rates, joint rates, fares, tolls, schedules, or classifications, or service which have been filed and published by any public utility, except after thirty days' notice to the Commissioners, which notice shall plainly state the changes proposed, provided, that the Commissioners may, in their discretion and for good cause shown, allow changes upon less than the notice herein specified either in particular instances or by a general order applicable to special or peculiar conditions or circumstances," is considered and, for reasons stated in the opinion, it is held that the same has no application in the instant case, p. 281.

[February 18, 1939. Rehearing denied March 15, 1939.]

Headnotes by the COURT.

APPEAL from judgment for plaintiff in suit to restrain a power company from cutting off service on account of nonpayment of bill therefor at alleged excessive rates; reversed and case remanded with directions to enter judgment for defendant.

APPEARANCES: Traynor & Traynor, of Devils Lake, and Field & Field, of Fergus Falls, Minn., for appellant; F. T. Cuthbert, of Devils Lake, for respondent.

NUESSLE, C. J.: Plaintiff brought this action to restrain the defendant from cutting off its electrical service to the plaintiff on account of the nonpayment of the bill therefor at the alleged excessive rates sought to be charged by the defendant. The defendant, answering denied the allegations of the complaint with respect to the overcharge and counterclaimed to recover the amount of its bill for the service furnished at the disputed rates. The trial court found for the plaintiff. Judgment was entered accordingly and the defendant appeals.

The plaintiff is engaged in operating a laundry and dry-cleaning plant in the city of Devils Lake. The defendant is a corporation engaged in the business of manufacturing, distributing, and selling electricity for light and power purposes. For some time prior to July 1, 1936, there had been a controversy between the plaintiff and the defendant and others as to the rates to be charged by the defendant for its service. During this time there was a movement on foot in the city of Devils Lake to have the city build and operate a power and light plant and an election was held whereby the voters empowered the city commission to proceed in this direction. In July, 1936, the plaintiff and defendant, aiming at an adjustment and settlement of their controversy as to the

rates to be charged, entered into a written arbitration agreement whereby the matter of the rates for the light and power to be furnished to the plaintiff was to be submitted to arbitrators and the arbitrators were agreed upon and named. One of them was C. W. McDonnell, a member of the Board of Railroad Commissioners. Pursuant to the terms of this agreement the arbitrators convened, made such investigation as they deemed proper at a hearing held for that purpose, and in August, 1936, agreed upon and signed a written award in which they stipulated that they had "mutually agreed to the following rate schedule which shall be effective starting with the billing applicable for the month of July, 1936, and retroactive to July 1, 1936, said agreement and rate schedule to be defined as a temporary Laundry Power rate schedule for Devils Lake, North Dakota, said rate schedule to be effective up to and including July 18, 1937, and to terminate automatically as of that date. This rate schedule to be applied to the total of the electrical services of any classification used by the Devils Lake Steam Laundry." Then followed the rates determined upon together with other provisions relative to the furnishing and discontinuing of the service and the manner in which the same should be billed and paid for.

Thereafter, and on the 28th day of September, 1936, the defendant filed with the Board of Railroad Commissioners an electric rate schedule for Devils Lake in accordance with the written award of the arbitrators, which also was filed. This schedule was approved by the Board on November 7, 1936, to be effective up to and including July 18, 1937, and to terminate automatically as of that date. In the meantime, after this award was made and prior to the time when the same was filed with and approved by the Board, the defendant had adjusted its differences with the city of Devils Lake and obtained a new franchise.

Prior to July, 1936, the Board of Railroad Commissioners had duly established and put into effect rates covering service of the kind furnished by the defendant to the plaintiff in the city of Devils Lake and these rates have been at all times since and now are in effect except as they were modified by the rates fixed by the arbitrators and filed with and approved by the Board. The rates originally fixed and in effect, except as thus modified, were appreciably higher than the rates fixed by the award. After the award and the adoption of the schedule drawn pursuant thereto, service was furnished by the defendant and the plaintiff was billed and paid for the same at the rates thus fixed until July 21, 1937. Thereafter the defendant billed the plaintiff at the old rates. The defendant did this on the theory that the rates fixed by the award had automatically terminated on that date and that the old rates had become effective again. The plaintiff refused to pay at these rates but offered to and did pay at the rates fixed by the award. The defendant refused to accept such payments as payments in full. Thereupon the plaintiff, alleging that the defendant threatened to cut off its current, brought the instant action to enjoin the defendant from so doing.

The plaintiff predicates its cause of action on the theory that the rates fixed by the arbitrators and approved

by the Board of Railroad Commissioners were to be permanent rates. The defendant defends on the theory that such rates were temporary only and automatically terminated on July 18, 1937, after which time the old rates were again in effect. The defendant, after setting up its defense, further counterclaimed to recover the difference between the charge for the service at the old rates for service furnished after July 21, 1937, and the amount paid by the plaintiff for such service based on the new rates. On the trial this amount was stipulated and if the case on this appeal goes against the plaintiff the defendant will be entitled to judgment in the amount thus stipulated.

The case was tried to the court. Plaintiff contended in the lower court, and contends here, that the rates fixed by the award were in fact permanent rates; that the arbitrators so understood and intended, as did all the parties; that through fraud and deception on the part of the defendant the award did not so recite; that, in any event, there having been no notice given of a change of rates, and the Board of Railroad Commissioners not having approved any such change, the rates provided in the award and the schedules made pursuant to the award and filed with and approved by the Railroad Commissioners remained in effect. The trial court found—contrary to the plaintiff's contention—that the rates agreed upon by the arbitrators were intended to be and were temporary only and were to be automatically terminated on July 18, 1937; that both plaintiff and defendant knew and understood this to be so; that the schedule of rates made pursuant to the award and filed with and approved by the Board of Railroad Commissioners was so accepted and approved as temporary only. But the trial court held with the plaintiff that pursuant to Chap. 207, Sess. Laws 1937, no change raising the rates from those fixed by the award and the schedule made pursuant thereto could be made without the 30-day notice required by this statute, and since no such notice had been given the rates thus fixed continued in effect.

[1] There is some evidence in the record tending to sustain the plaintiff's contention that the arbitrators intended the rates as fixed by their award to be permanent rates. On the other hand, the award speaks positively for itself to the contrary. There is no ambiguity in its terms. It is positive and explicit. The plaintiff insisted that the defendant file a rate schedule in accordance with its terms, yet it is beyond question that the plaintiff as well as the defendant considered the rates fixed by the award to be temporary only. The plaintiff so stated in a letter (the same letter in which it insisted upon the filing of the new schedule) written concerning the matter to Mr. McDonnell of the Railroad Commission on September 22nd. Plaintiff therein said, speaking with respect thereto, "They (the defendant) have nothing to complain about and they are bound by our arbitration to comply for one year and in the meantime if I cannot get some agreement from them to make it permanent then I shall make a purchase of a new Diesel engine and cut the power company out completely. . . ." Likewise, the Board of Railroad Commissioners, in approving the rate schedule

filed by the defendant with them, so considered it and so noted it in their records. We accordingly hold that the trial court's finding on this question of fact was correct.

[2] There remains then the question as to whether the provisions of Chap. 207, Sess. Laws 1937, *supra,* are applicable in the instant case so as to require the notice therein provided before the defendant could charge for its service at the so-called "old rate" so that until such notice was given and the requirements of the statute in other respects complied with the rates fixed by the award continued in effect.

Chapter 207, among other things, provides: "No change shall be made by any public utility in any tariffs, rates, joint rates, fares, tolls, schedules, or classifications, or service which have been filed and published by any public utility, except after thirty days' notice to the Commissioners, which notice shall plainly state the changes proposed; provided, that the Commissioners may, in their discretion and for good cause shown, allow changes upon less than the notice herein specified either in particular instances or by a general order applicable to special or peculiar circumstances or conditions."

It seems to us that this statute can have no application in the instant case. The Board of Railroad Commissioners, acting pursuant to authority conferred by the legislature (see § 4609cl et seq., 1925 Supplement) had fixed the rates for the service furnished by the defendant to the plaintiff. These rates were in effect when the arbitration agreement was entered into and the award was made by the arbitrators. Until some proper change was made no other rates were lawful. Defendant could charge no more and no less. Temporary rates are what their name implies. When the period of their duration is fixed by the rate-making body and that period expires, then the rates theretofore in effect again become effective. Otherwise there would be no object in fixing an expiration date. The award in the instant case provided that the rates fixed by it should "automatically terminate" on July 18, 1937. The rate schedule filed by the defendant pursuant to this award so provided. And when the schedule was approved and adopted by the Commissioners the rates were noted in their records as automatically expiring on that date. Certainly the defendant could not thereafter fix any rates that it might choose. So since the rates fixed by the award automatically expired on July 18, 1937, there were none that could be charged other than those originally fixed by the Commissioners. Accordingly, no notice other than that contained in the award was required and no proposed schedule other than that theretofore in effect pursuant to the Commissioners' action was necessary.

The judgment appealed from is reversed and the case is remanded with directions that judgment be entered in conformity with this opinion.

Morris, Burr, and Christianson, JJ., concur.

Burke, J., did not participate.

OKLAHOMA SUPREME COURT

Avant Gas Service Company

v.

Corporation Commission et al.

[No. 27599.]

(—Okla. —, 89 P. (2d) 291.)

Return, § 62 — Confiscation — Service charge prohibition.

Section 11620, O. S. 1931, 52 Okla. St. Ann. § 42, prohibiting gas utilities from making a fixed minimum charge, and providing that the consumer shall be charged only for the gas used or consumed as registered by the gas meter, is in itself constitutional, but where it is made to appear that a flat meter rate sufficient to return a fair profit is, for economic reasons, impossible of establishment without a service charge, the operation of such statute must in the particular case be suspended in order that the utility's constitutional guaranty against the taking of its property without due process of law may be safeguarded.

(RILEY, J., dissents.)

[February 28, 1939. Rehearing denied April 11, 1939.]

Headnote by the COURT.

APPEAL *from order of Commission denying authority to revise gas rates; reversed and remanded.*

APPEARANCES: E. S. Ratliff, of Oklahoma City, for plaintiff in error; J. B. A. Robertson and S. J. Gordon, both of Oklahoma City, for defendants in error.

GIBSON, J.: The Avant Gas Service Company has appealed from an order of the Corporation Commission denying petition for authority to revise and change the rate for natural gas in the town of Avant as in said petition requested.

The gas company is now, and has been for a number of years, losing money in furnishing gas to the inhabitants of Avant solely by reason of the present established rate. To increase the rate to a figure where the present volume of consumption might render a reasonable return will not solve the difficulty for, as charged by the company and found by the Commission, numerous consumers by reason of inability to pay will discontinue service and, as a result, the income will not provide the return to which the company is in law entitled.

The company on account of these conditions seeks permission to establish a flat rate per thousand cubic feet within the ability of the people to pay, and authority to charge each consumer a designated monthly service charge or minimum bill, asserting that such a charge or bill against each meter will

serve to equalize the cost of service among consumers and make possible a reasonably low rate per thousand cubic feet which with the monthly service charge or minimum bill will give to the company a fair return, and to the consumer a rate reasonably fair and equitable under the circumstances.

The Commission found that the greater number of bills rendered for gas service in Avant fall far short of the actual cost of the service rendered, thus casting upon the smaller percentage of patrons, those who purchase larger quantities of gas, the burden of paying not only for their own service but the additional burden of contributing to the deficit created by the greater number of consumers, that is to say, a small percentage of the consumers must pay the cost of service common to all.

The Commission found that an increase in flat rate sufficient to bring a fair return would be unduly burdensome upon that class of consumers who use reasonable quantities of gas, and, as we have said, the increase would not solve the difficulty. The petition was denied solely on the ground that § 11620, O. S. 1931, 52 Okla. St. Ann. § 42, prohibits gas utilities from making and maintaining a fixed minimum charge for gas, or for the use of gas meter, or for the inspection of any gas meter used on the premises of any consumer, and provides that the consumer shall be charged only for the gas used or consumed as registered by the gas meter.

This appeal attacks the constitutionality of said statute.

It is said, first, that the statute as interpreted by the Corporation Commission will result in depriving the gas company of its property without due process of law.

The evidence, without room for doubt, shows that the gas company cannot continue in business and serve the citizens of Avant at a flat meter rate alone and avoid ultimate loss of its property. It is entitled to operate its business and to realize a reasonable profit therefrom. Any statute that would deprive it of either of those rights stands squarely in opposition to that portion of the Fourteenth Amendment to the Federal Constitution, USCA, which declares that the state shall deprive no person of his property without due process of law. Though the company's business is stamped with a public interest, it is entitled to operate the same and to receive from such operation a fair return in profit to be calculated under certain established rules and principles applicable in such cases. If the state in its attempt to regulate rates and service goes beyond that point of restriction, it must be concluded that it has exceeded the limitations placed upon it by the Federal Constitution in that such action would result in an appropriation of the company's property without compensation thus to abridge the privileges and immunities to which it is entitled as a citizen of the United States, and to take its property without due process of law.

The gas company alleges in its petition that it can continue its service and make a fair return if allowed to place in effect a rate of 65 cents per thousand cubic feet for the first 5,000 per month, 50 cents per thousand cubic feet for all in excess of 5,000, and $1.25 per month service charge to each consumer. The Commission made no

finding concerning the reasonableness of these proposed rates.

Our function here is merely to say whether or not the Commission should, in the face of § 11620 aforesaid, consider the merits of this demand.

Monthly service charges and minimum monthly bills have been recognized in a number of jurisdictions as necessary elements for consideration in fixing equitable rates on the theory that the cost of service without such a charge is unequally distributed among consumers. Rochester v. Rochester Gas & E. Corp. 233 N. Y. 39, P.U.R. 1922C, 793, 134 N. E. 828; Rivelli v. Providence Gas Co. (1921) 44 R. I. 76, P.U.R.1922B, 548, 115 Atl. 461, 20 A.L.R. 222; New York & Q. Gas Co. v. Prendergast, 1 F. (2d) 351, P.U.R.1924E, 59. A minimum charge for service is in fact a rate. Blanket rates throughout the state are impossible of definite establishment by the legislature. Though a general act applying to rates may in some instances be enforced with proper and legal effect, it may be wholly unsuitable in others and result in unconstitutional infringement upon the utility's rights. If § 11620 actually prevents a reasonable return then it must give way in the particular case. Appropriate here is the language of Justice Cardozo in Municipal Gas Co. v. Public Service Commission, 225 N. Y. 89, 95, 96, P.U.R.1919C, 364, 367, 121 N. E. 772, 774. When speaking of a rate statute he said:

". . . Into every statute of this kind, we are to read, therefore, an implied condition. The condition is that the rates shall remain in force at such times and at such only as their enforcement will not work denial of the right to a fair return. When the return falls below that level, the regulation is suspended. When the level is again attained, the duty of obedience revives. There would be no obscurity about this if the condition were expressed. It is no less binding because it is implied. The Constitution is the supreme law, and statutes are written and enforced in submission to its commands."

Section 11620 is a regulation.

Where rates are susceptible of proper adjustment without a monthly service charge or minimum bill the statute prohibiting such charge should be observed by the rate-fixing officers. The better view is that statutes of the character of § 11620 are not necessarily void in their inception but are, in their application, subject to changing times and conditions, and to different localities and their respective demands.

In New York & Q. Gas Co. v. Prendergast, *supra*, the Federal district court had under consideration a statute of New York fixing a maximum flat rate per thousand cubic feet for gas, and another, similar to § 11620, prohibiting a service charge. Concerning the question of fixing rates under those statutes, the court announced the rule as follows: "It is within the power of a legislature to prescribe the form of charges by a gas company, and a statute prohibiting a 'service charge' is in itself constitutional and valid; but when, taken in connection with another statute or order of a Public Service Commission fixing a maximum price for gas, it so reduces the entire permissible charge

that it becomes confiscatory, it is unconstitutional."

And in United States Light & Heat Corp. v. Niagara Falls Gas & E. L. Co. 23 F. (2d) 719, 736, P.U.R. 1927E, 749, 758, the court in language highly appropriate to the instant situation summed up the legal effect of such statutes when the same interfere with the utility's right to a reasonable return. The language is as follows: "Here, as already stated, the evidence in its entirety warrants holding that in prohibiting the so-called service charge to consumers of gas at Niagara Falls, the gas company is estopped from allocating the cost of production to the consumers in equal proportions, and, moreover, is prevented from earning a reasonable profit upon its invested capital. The enforcement of the particular statute in controversy (subdiv. 6 of § 65) must therefore be held to be confiscatory and in violation of the constitutional rights of both plaintiffs and of the defendant Niagara Falls Gas & Electric Light Company."

Though the circuit court of appeals reversed the latter cause on the ground of improper parties, 47 F. (2d) 567, P.U.R.1931B, 127, the pronouncement of the law by the district court was recognized as the correct view in such case.

Counsel for the Corporation Commission advance the argument that the Federal decisions above did not hold the service charge statute unconstitutional but held both the maximum flat rate statute and the service charge statute, when considered together, to be unconstitutional. The distinction between that and the present situation is not of sufficient importance to make a real difference. In this state the Commission under delegation of authority from the Constitution and the legislature fixes the maximum flat rate to suit the circumstances of each case. If at any time the flat rate as so fixed will not permit a fair return, the enforcement thereof would be to violate the utility's constitutional guaranty. And likewise, if a maximum flat rate sufficient to render the proper return is impossible of promulgation by reason of some restrictive statute the latter must be cast aside in favor of the constitutional guaranties. Such is the case here. Section 11620, a rate statute, if enforced, will deprive the utility of all opportunity to realize the return to which it is entitled, for the Commission will be rendered powerless to afford it relief.

Here it is conclusively shown that to establish a flat meter rate sufficient to permit a reasonable return without the additional monthly service charge or minimum bill is impossible. The gas company asserts that it can continue service at a reasonable flat rate if allowed to collect a monthly service charge, and that such combination of rates will be within the ability of its consumers to pay. In these circumstances it should be accorded the opportunity of a hearing to that end, and the provisions of § 11620 should be suspended and, in this particular case, disregarded. The company must be authorized to collect, in addition to the flat meter rate to be designated, a fixed monthly service charge, or in the alternative, to render and collect a minimum monthly bill from those consumers who fail to use the minimum volume of gas to be named by the Commission, the alternative to be de-

pendent upon the circumstances as disclosed upon hearing.

Counsel for the Commission say this court is without jurisdiction to review a rate case of this character, contending that the matter is one of administrative concern and not judicial, § 1, Art. 4, Const. Okla. St. Ann. But that question has been heretofore decided adversely to counsel's contention. We accord judicial review to such orders. We will affirm or reverse, or will render such order as the Commission should have rendered where judicial action will warrant, and will remand for further procedure where remand is appropriate. See Oklahoma Cotton Ginners' Asso. v. State (1935) 174 Okla. 243, 51 P. (2d) 327.

Our conclusion necessitates a remand of this cause to the Corporation Commission with direction to proceed with the hearing on the gas company's petition in accordance with the views herein expressed.

It is so *ordered.*

Bayless, C. J., Welch, V. C. J., and Osborn, Hurst, Davison, and Danner, JJ., concur.

Riley, J., dissents.

Corn, J., absent.

SECURITIES AND EXCHANGE COMMISSION

Re New York & Richmond Gas Company

[File No. 43-175, Release No. 1442.]

Dividends, § 6 — Condition as to Commission approval.

1. A condition making approval of the Securities and Exchange Commission a prerequisite to any payment of dividends was imposed, upon the grant of authority to reduce capital by changing the stated value of common stock, in order to prevent a possible distribution of capital where there was a question as to existing impairment of capital, p. 292.

Accounting, § 56.2 — Reduction of common capital — Effect of state Commission determination.

2. The approval of a state Commission of a proposed reduction of common capital does not exempt the transactions in connection therewith from the provisions of the Public Utility Holding Company Act of 1935, and § 7(e) of that act seems to imply that prior approval of a state Commission does not foreclose consideration of this type of transaction by the Securities and Exchange Commission; but the Federal Commission attaches great weight to the fact that the state Commission has granted approval, p. 293.

[February 16, 1939.]

DECLARATION *pursuant to §§ 6(a)(2) and 7 of the Public Utility Holding Company Act of 1935 regarding the reduction of capital of a subsidiary of a registered holding company; declaration ordered to become effective subject to conditions.*

By the COMMISSION: New York and Richmond Gas Company, a New York corporation and an indirect subsidiary of Washington and Suburban Companies, a Massachusetts common-law trust and a registered holding company, has filed a declaration, and amendments thereto, pursuant to §§ 6 (a) (2) and 7 of the Public Utility Holding Company Act of 1935 regarding the reduction of its capital. The reduction is to be effected by an amendment of the declarant's Articles of Incorporation. That part of the present capital represented by the authorized and outstanding 150,000 shares of no-par common stock of $1,500,000 will be reduced to $850,000, a reduction of $650,000, by changing the stated value thereof from $10 to $5.66⅔ a share. The number of shares will not be reduced nor will the respective voting power of the outstanding stocks be changed.

A public hearing was held on the declaration, as amended, pursuant to appropriate notice. No member of the public appeared or requested an opportunity to be heard. The declarant prior to the entry of the findings, opinion, and order of the Commission, waived a trial examiner's report, submission of proposed findings of fact by the Commission, and requested findings of fact by counsel for the Commission, and oral argument before the Commission. The Commission has considered the record in this matter and makes the following findings:

The declarant is subject to the jurisdiction and supervision of the Public Service Commission of the state of New York. In 1935 the New York Commission instituted a proceeding to determine the propriety and accuracy of the accounts, books, records, and documents of the declarant and recommended that the declarant make certain adjustments to its asset accounts, surplus, and certain liability accounts. The adjustments, which were subsequently brought down to December 31, 1937, have been acquiesced in by the declarant. The declarant claims that the restatement of capital, for which our approval is sought, was proposed in deference to the wishes of the New York Commission which first had recommended—and later approved—the reduction of common capital account as a method partially to handle these write-downs.[1]

The New York and Richmond Gas Company was organized under the laws of New York in 1901, by the consolidation of Richmond County Gas Light Company and the predecessor New York and Richmond Gas Company, which had previously merged with Consumers Gas Light Company. The declarant is engaged in the manufacture, distribution, and sale of gas at retail within Richmond county (Staten Island), New York.

Of the 150,000 shares of the declar-

[1] The declarant also has been ordered to comply with the reclassification of accounts in pursuance of the provision of the Uniform System of Accounts for Gas Corporations prescribed by order of the New York Commission effective as of January 1, 1938. The necessary reclassifications together with other adjustments, with one exception, were made as of January 1, 1938. The reduction in the stated capital will be made as of the date the Certificate of Amendment is filed and approved. In the meantime an amount of $650,000 (equivalent to the proposed reduction in capital stock) is included on the asset side of the balance sheet in the Gas Plant Acquisition Adjustment Account together with an additional amount of $400,000 which latter amount will be permitted to remain for amortization over an indeterminate period of years.

ant's no-par common stock, 149,460 shares or 99.64 per cent are owned by eleven "Tree" Companies,[2] all of which are wholly owned subholding companies and subsidiaries of Washington and Suburban Companies. The remaining 540 shares, and all of its outstanding 6 per cent cumulative preferred stock (19,302 shares of 30,000 authorized) are publicly held. The preferred stock is entitled to vote only upon the default of dividends totaling $6 per share. There also is outstanding an issue of first refunding 6 per cent mortgage bonds in the principal amount of $2,125,000, due 1951.

The present capitalization of the company and its capitalization after giving effect to the proposed reduction in common capital account, prepared from figures submitted by the company, are shown by the following tabulation:[3]

	As at January 1, 1938			
	Actual	%	Pro Forma	%
Funded debt	$2,125,000	31.7	$2,125,000	41.7
Preferred stock[4]	1,930,200	28.9	1,930,200	37.9
Common stock	1,500,000	22.4	850,000	16.7
Earned surplus	1,138.925	17.0	185,979	3.7
Total	$6,694.125	100.0	$5,091,179	100.0

As of January 1, 1938, the arrearage on the cumulative preferred stock aggregated $173,718, and by October 31, 1938, aggregated $260,577, or $13.50 per share. Though the income statement as prepared by the declarant indicates that the annual preferred dividend requirement of $115,812 has been earned, it was stated that the company had insufficient cash with which to pay such dividends.

The ratio of long-term debt to depreciated property per books (after giving effect to the proposed adjustments and excluding a $400,000 balance in the Gas Plant Acquisition Adjustments Account)[4a] will be 41.8 per cent.

The Determinations of the New York Commission

The determinations of the New York Commission were based upon the results of an actual physical inventory of the company's property conducted by Stone and Webster Engineering Corporation and reviewed and revised (downward) by the New York Commission's own staff. The cost of such inventoried property was determined chiefly from a detailed examination of recorded expenditures actually incurred by the company and found to be proper fixed capital charges. In cases where property was found, for which no reliable records of expenditure were available, it was, of course, necessary to estimate the probable cost. With the exception of $400,000 balance in the Gas Plant Acquisition Adjustments Account, the determination reflects the New York Commission's conclusions as to the

[2] Each of these eleven corporations own approximately 9 per cent of the common stock of New York and Richmond Gas Company. They are called "Tree" Companies because they are named for trees. E. g., The Ashwood Company, The Beechtree Company, The Birch Company, etc.

[3] Excluding a short-term 4 per cent note in the amount of $44,000, which is listed on the books of the company as a current liability.

[4] Not including dividend arrears amounting to $173,718.

[4a] See *supra*, note 1.

cost of the property when first installed or acquired for public utility purposes.

The largest single item attacked by the New York Commission was the company's opening entry in its property account. As has been stated, the predecessor New York and Richmond Company, immediately upon its organization in 1901, purchased control of Consumers Gas Light Company and Richmond County Gas Light Company, absorbing the former by merger. Consumers Gas Light Company had substantially no property other than a franchise—none of the physical property was ever recorded on the books of declarant; and Richmond County Gas Light Company had property listed on its books at $496,976.56. The opening entry on declarant's books listed "Plant and Property" at $2,837,234.24. The New York Commission said that the latter figure clearly was only a balancing entry. The old New York and Richmond Company agreed to issue to Forrest and Company $1,000,000 principal amount of bonds and issued $1,349,000 par value of its fully paid nonassessable capital stock, in payment for all the common stock of Consumers Gas Light Company and all, except 500 shares,[5] of the capital stock of the Richmond County Gas Light Company.[6]

The presently available records of the 1901 transactions are not sufficiently detailed to permit a conclusive determination as to whether the purchase and sale of the two predecessor companies was an arm's-length transaction or merely part of a promoter's scheme.[7]

In any event, the New York Commission referred to the difference between the value of the property acquired as per the books of the predecessor company and the value as per the opening entry on the books of declarant, a sum of $1,840,257.68, as "an apparent write-up."

As a result of the "original cost" determination, together with other changes in accounts, the New York Commission advised the declarant to make adjustments in its accounts in an aggregate amount of $2,002,945.

Method of Write-offs

Because the Surplus Account of January 1, 1938, was only $1,138,924.55, the New York Commission considered it impracticable to charge the entire balance to this account and create a surplus deficit. Having earlier indicated that one method of handling the adjustments was to reduce the stated value of the common stock and leave a balance in the Gas Plant Acquisition Adjustments Account, the New York Commission acknowledged its willingness to accept the company's suggestion of handling the adjustments. The company's plan was as follows:

[5] By 1907 the remaining 500 shares had been acquired by declarant, which issued $50,000 par value stock in payment thereof.

[6] Forrest and Company paid all expenses in connection with the acquisition, merger, and consolidation, and also paid $100,000 for an additional 1,000 shares of New York and Richmond Gas Company common stock.

[7] It does not appear that there were any common officers or common directors between Forrest and Company and the old New York and Richmond Gas Company, nor does it appear what price Forrest and Company paid for Richmond County Gas Light Company and Consumers Gas Light Company.

Permit to remain in gas plant acquisition adjustments account ..	$400,000
Reduce stated value of common stock	650,000
Charge surplus with remainder or	952,945
	$2,002,945

Though the New York Commission has acquiesced in the company's suggestion as to how the write-downs were to be handled, it was very critical of the company's retirement reserve which it regarded as inadequate to meet the depreciation actually existing and because this inadequacy permitted the company to show an inflated earned surplus.

The Reserve for Depreciation of Gas Plant

The property account on the books of the declarant as at January 1, 1938, and as it will appear after giving effect to the proposed adjustments, is as follows:

	Actual	Pro Forma
Gas plant in service	$5,283,880	$4,998,466
Construction work in progress	3,866	3,750
Gas plant acquisition adjustments	1,523,432	400,000
Other physical property	115,514	130,756[7a]
Gross property	$6,926,692	$5,532,972
Reserve for depreciation	$70,310	$63,224

The $400,000, which appears in the pro forma statement, will remain on the books but is to be amortized over an undetermined period of years.

The reserve for depreciation is equivalent to 1.3 per cent of the gross depreciable property account (excluding the $400,000 item). The reserve has been largely built up from annual appropriations from income.[8] The retirement provisions were not based upon an estimated life of the physical property. The annual accruals to the reserve have been based upon a rate of 3½ cents per thousand cubic feet of gas sold.

The Account Designated "Earned Surplus"

Prior to the declarant's reclassification of accounts as at January 1, 1938, the Surplus Account was not designated as either "capital surplus" or "earned surplus." It was testified that so far as the company records show there have been no transactions which would form the basis for setting up a capital surplus account; that all the surplus in the surplus account, namely, $1,138,925 as at January 1, 1938, was accumulated out of income. It is proposed that $650,000 of the adjustments is to be charged directly against capital stock account, and not against surplus. Only $952,945.47 of the contemplated adjustments was charged against the existing Surplus Account, thus leaving a revised balance therein as at January 1, 1938, of $185,979.08.

The Applicable Provisions of the Act

The question before us is whether the statute entitles the declarant to an order permitting the declaration to become effective. This declaration has been filed because § 6 (a) (2) of the

[7a] The record before us indicates that this item represents nondepreciable property.

[8] Credits also have been made to the reserve from the proceeds of the sale of land and condemnation awards.

Public Utility Holding Company Act provides that, "Except in accordance with a declaration effective under § 7 and with the order under such section permitting such declaration to become effective, it shall be unlawful for any registered holding company or subsidiary company thereof . . . to exercise any privilege or right to alter the priorities, preferences, voting power, or other rights of the holders of an outstanding security of such company."

Section 7(e) provides that if the requirements of subsection (g) are satisfied, the Commission shall permit a declaration regarding the exercise of a privilege or right to alter the priorities, preferences, voting power, or other rights of the holders of an outstanding security, to become effective unless the Commission finds that the acts contemplated therein "will result in an unfair or inequitable distribution of voting power among holders of the securities of the declarant or is otherwise detrimental to the public interest or the interest of investors or consumers."

It may be contended that at present the distribution of voting power between the common and preferred (which votes only in the event of dividend defaults) is disproportionate. The common stock has 89 per cent of the vote, while the preferred stock has only 11 per cent of the vote. The percentages of preferred stock investment and common stock and surplus in the total stock capitalization both as now existing and as proposed appear below:

	As at October 31, 1938			
	Actual	%	Pro Forma	%
Preferred stock	$1,930,200	41.1	$1,930,200	62.2
Common stock and surplus [9]	2,778,871	58.9	1,175,926	37.8
Total	$4,709,071	100.0	$3,106,126	100.0

After giving effect to dividend arrears of $260,577 on the 6 per cent preferred as at October 31, 1938, the percentages are:

	Actual	%	Pro Forma	%
Preferred stock	$2,190,777	46.6	$2,190,777	70.6
Common stock and surplus [9]	2,518,294	53.4	915,349	29.4
Total	$4,709,071	100.0	$3,106,126	100.0

The proposed reduction in common capital account will increase the ratio of preferred to the total stock capitalization without a corresponding increase in the voting power. This may be said to raise the question whether the reduction in capital creates—in the language of the statute, "results in"—an unfair or inequitable distribution of voting power. Apposite here are certain statements we made in Re Columbia Gas & E. Corp. Holding Company Act Release No. 1417, 28 P.U.R. (N.S.) 476. In that case we said, regarding the question whether the reduction in capital results in an unfair or inequitable distribution of voting power, "It might be argued that it does not for the following reasons: If the voting rights are inequitably distributed, that condition already exists and does not result from the steps

[9] By October 31, 1938, the surplus had increased to $325,925.81 from $185,979.08 on January 1, 1938.

that may be taken pursuant to the declaration, and it would exist whether or not the contemplated adjustments in the accounts are made. . . . On the other hand, it might be said that the reduction of the capital will free the corporation from a deficit in its surplus account and will thereby give the board of directors, controlled by the common stock, a power over dividends which they would not otherwise have and which, if uncontrolled might impair the interests of the preferred stocks, and that as a consequence, an inequitable and unfair distribution of voting power will result from the transaction. But the conditions and reservations which we attach to our order herein make it unnecessary here to decide that question."

For like reasons it is unnecessary to decide the similar question raised in this case. We shall not, therefore, withhold our decision as to this declaration until we determine what action, if any, should be taken with respect to the existing distribution of voting power.

It should clearly be understood that we reserve completely all our powers under § 11 (b) (2) with respect to any unfair or inequitable distribution of voting power whether now existing or hereafter arising as a result of transactions hereby authorized, or otherwise.

While the declarant contends that its retirement provisions have been in conformity with the accounting regulations prescribed by the New York Commission,[10] the New York Commission stated that the account designated "Earned Surplus" is not in fact an earned surplus "because the company has not in the past set aside out of revenues a sufficient amount for depreciation."

It is questionable whether under § 12 (c) we could regard this "earned surplus" account as available for the payment of dividends.[11]

[1] We have no occasion now to determine to what extent, if any, the common capital of the corporation may be impaired. Such a determination might require us to measure the extent of existing depreciation and the value of the declarant's assets. However, we are charged with the responsibility of seeing to it that holding companies (which are not subject to the jurisdiction of local regulatory Commissions in such matters) do not use their control over operating companies to the detriment of the latter. In addition, the provisions of § 12 (c) of the act impose duties upon us to restrict the payment of dividends to prevent any improper use of capital. Presently, our rule provides that companies subject to the act may not declare or pay any dividend (other than

[10] This contention has been approved in certain proceedings. See New York & Richmond Gas Co. v. Nixon, unreported (1921), appeal dismissed (1922) 203 App. Div. 860, 196 N. Y. Supp. 941; 204 App. Div. 838, 197 N. Y. Supp. 933; New York & Richmond Gas Co. v. Prendergast (1925) 10 F. (2d) 167, 202, P.U.R.1925E, 19, P.U.R.1926B, 759.

[11] Cf. Holding Company Act Release No. 590 (Accounting Series Release No. 1) April 1, 1937, dealing with the propriety of charging losses resulting from the revaluation of assets to capital surplus, created upon the reduction of the common capital account, rather than to earned surplus.

Section 20(b) of the act provides: "In the case of the accounts of any company whose methods of accounting are prescribed under the provisions of any law of the United States or of any state, the rules and regulations or orders of the Commission in respect of accounts shall not be inconsistent with the requirements imposed by such law or any rule or regulation thereunder. . . ."

a dividend in liquidation of a wholly owned subsidiary) out of capital or unearned surplus, except upon application to, and approval by order of, the Commission. Because of the possibility that dividends in the future may effect a distribution of capital we shall impose a condition making our approval a prerequisite to any payment of dividends.

Conclusions

[2] In this case, the original proposal to reduce the common capital account as one means of handling the write-downs was suggested first by the New York Commission.[12] It was in pursuance of this suggestion that the management formulated, after informal consultations with the staff of the New York Commission, this particular plan. The plan was subsequently presented to the New York Commission as the company's proposal. Though indicating its disapproval of the retention in the balance sheet of the $400,000 item and stating its opinion that the surplus account was not an earned surplus because the company had not in the past set aside out of revenues a sufficient fund for depreciation, the New York Commission tacitly approved the plan by stating that the "suggestion of the company should be accepted." Subsequently, on December 20, 1938, the plan in all its details was approved formally by the New York Commission in Case No. 9729.

The instant declaration was required to be filed by virtue of the provisions of § 6 (a) (2) of the act and not those of § 6 (a) (1). It does not, therefore, fall under the provisions of § 6 (b),[13] and the approval of the state Commission of the proposed reduction of common capital does not exempt the transactions from the provisions of our act. Indeed, § 7 (e), the section applicable to this declaration, seems to imply that the prior approval of a state Commission does not foreclose our consideration of this type of transaction. But we attach great weight to the fact that the state Commission has approved this transaction. Owing to this and other relevant factors, we shall not withhold our approval of this declaration.

The declarant is now making studies to determine to what extent its depreciation charges should be changed. Whatever change is adopted will be in compliance with the New York Commission's recently adopted system of accounts. The plan which will be ultimately formulated for the amortization of the $400,000 now listed in the Gas Plant Acquisition Adjustments Account also will be in accordance with the wishes of the New York Commission.

The New York Commission having heretofore approved this reduction in common capital account,[14] we find that

[12] Opinion of March 11, 1938. See 23 P.U.R.(N.S.) 463, 490.

[13] Section 6 (b): ". . . The Commission by rules and regulations or order, subject to such terms and conditions as it deems appropriate in the public interest or for the protection of investors or consumers, shall exempt from the provisions of subsection (a) the issue or sale of any security by any subsidiary company of a registered holding company, if the issue and sale of such security are solely for the purpose of financing the business of such subsidiary company and have been expressly authorized by the state Commission of the state in which such subsidiary company is organized and doing business. . . ."

[14] Case No. 9729, December 20, 1938.

the provisions of § 7 (g) are satisfied.

Upon these facts as now found and subject to the conditions and reservations of power which hereafter will be stated, the Commission does not feel warranted in finding, pursuant to § 7 (e), that such reduction will result in an unfair or inequitable distribution of voting power among the holders of securities of the declarant or that it is otherwise detrimental to the public interest or the interest of investors or consumers.

However, as already indicated, the Commission finds it necessary to attach certain conditions to its order permitting the declaration to become effective in order to assure compliance with the conditions specified in § 7 and other pertinent sections of the act. Our order permitting the declaration to become effective will, therefore, be subject to the following conditions:

(1) The corporate action and all matters connected therewith or related thereto shall be performed in all respects as set forth in and for the purpose represented by, the declaration;

(2) No charge (other than one required by the New York Commission) shall be made to the surplus account unless said charge first be authorized by the board of directors and subsequent to such authorization notice of the making of such charge be given to this Commission; in which event the Commission reserves jurisdiction, after notice and opportunity for hearing, to disapprove such charge on the basis of the record herein and any additional evidence that may be adduced by any interested party; and in the event that the Commission shall, within twenty days, notify declarant to show cause why such charge should not be disapproved, the charge in question, shall not be made until expressly authorized by order of this Commission: Provided, however, that in no event, until further order of the Commission, shall the declarant pay any dividends on any of its stocks unless it has filed with this Commission under § 12 (c) of the act and the applicable rules and regulations thereunder on application for approval of the payment of such dividends and except in conformity with the order of the Commission issued in respect thereof; and

(3) The Commission reserves full power and jurisdiction to act at any time under § 11 (b) (2) with respect to any unfair or inequitable distribution of voting power whether now existing or hereafter arising.

MISSOURI PUBLIC SERVICE COMMISSION

Re Union Electric Company of Missouri

[Case No. 9624.]

Certificates of convenience and necessity, § 47 — When required — Service continuance under new franchise.

1. A public utility company which has received a certificate of convenience

and necessity authorizing service in a municipality under a franchise previously granted is not required to obtain a new certificate of convenience and necessity to render service in the municipality after expiration of such franchise and the granting of a new franchise, p. 297.

Franchises, § 6 — Necessity of Commission approval — Renewal franchise.

2. A public utility company which has received a certificate of convenience and necessity to operate under a municipal franchise should, after expiration of such franchise and the receipt of a new franchise, submit to the Commission a copy of the new franchise for examination and approval and obtain from the Commission permission and approval to exercise the rights and privileges and to assume the obligations arising under such new franchise, p. 297.

[March 8, 1939.]

APPLICATION *by electric utility for authority to exercise rights and privileges conferred by franchise ordinances; granted.*

By the COMMISSION: This case is before the Commission on an application by Union Electric Company of Missouri (hereinafter referred to as the applicant) for an order of the Commission either (1) certifying anew the necessity and convenience of certain utility operations in the city of Elvins and the village of Kimmswick, respectively, and permitting and approving such operations as an exercise of recently renewed franchises of said municipalities or—in the alternative—(2) declaring that previously issued orders of the Commission certifying the convenience and necessity of such operations and permitting and approving the same are still effective and constitute permission and approval by the Commission of exercise by the applicant of the local franchise rights and privileges recently renewed in its favor by the two municipalities in question.

A hearing was held upon the application on January 19, 1939. From the verified application and from evidence presented at the hearing, the Commission finds:

A. (As to the city of Elvins): Since July, 1923, the applicant has carried on without interruption electric public utility operations in the city of Elvins and has been and is the only electric public utility company serving that city and the immediate environs thereof. It has done so under an order of this Commission entered in Case No. 3621 on July 18, 1923 (P.U.R.1924A, 74) whereby this Commission certified to the necessity and convenience of such utility operations and granted its permission and approval thereto. At the time of the issuance of said order by this Commission, the applicant was the assignee and as such the owner of rights conferred by an ordinance of the city of Elvins authorizing use of the streets, alleys, and public places of that city by the applicant for the purpose of carrying on said utility operations. Said franchise ordinance of the city of Elvins expired in May, 1936. By a new ordinance numbered 243, enacted by said city on October 4, 1937, approved at an election held for that purpose on October 26, 1937, and

thereby made effective, the rights vested in applicant by the first ordinance until May, 1936, were renewed for a period of ten years from the effective date of the ordinance enacted and approved in October, 1937. Said ordinance has been duly accepted by the applicant. Applicant is now and has been since October, 1937, operating under and in accordance with the same; and there has been no interruption in the public utility operations which applicant has carried on in the city of Elvins or in the service which it has rendered in said city since 1923 when it began its operations in that locality.

B. (As to the village of Kimmswick): The applicant has been carrying on in the village of Kimmswick operations as an electric utility and has been rendering service to said village and the immediate environs thereof since February, 1920, pursuant to an order of the Commission made and entered on the 3rd day of February, 1920, in Case No. 2264, whereby the Commission certified to the convenience and necessity of such operations and granted its permission and approval thereof. At the time when said order was issued, the applicant was the owner by assignment of the rights conferred by a franchise ordinance of the village of Kimmswick effective until March 14, 1937. Prior to said last-named date, said village of Kimmswick by a new ordinance numbered 91, renewed said franchise rights for a period of twenty years from the 23rd day of February, 1937. Under said last-named ordinance, as under the ordinance first referred to, applicant is vested with the right and privilege to make use of the streets, alleys, and other public places of the village of Kimmswick in conducting its aforesaid operations as an electric public utility company. There has been no interruption in the applicant's operations as an electric public utility in said village of Kimmswick since 1920 when said operations began.

C. This case presents for determination two questions which we deem appropriate for decision by this Commission, namely:

(1) Whether, acting in its administrative and regulatory capacity, this Commission regards the respective certificates of necessity and convenience (heretofore issued by it to applicant authorizing applicant to render electric service in the city of Elvins and in the village of Kimmswick under franchises theretofore granted by said city and village) as having terminated with the expiration by limitation of the respective franchises, so as to require applicant, after obtaining new franchises from said city and said village, to make a new showing of, and procure from this Commission new certificates of, convenience and necessity to continue rendering substantially the same service in the same city and in the same village; and,

(2) Assuming that the Commission, as an administrative and regulatory policy, does not require applicant to make a new showing of convenience and necessity for the service in said communities, nor to procure new certificates of convenience and necessity therefor, should the applicant, before exercising any right or privilege under such new franchises, submit copies of such new franchises to the Commission for examination and approval and obtain from the

Commission certificates of permission to exercise the rights and privileges and to assume the obligations under such new franchises.

[1] On question (1): It appearing from the record that this Commission, after due hearing and upon satisfactory proof, heretofore issued certificates of convenience and necessity authorizing applicant, or its predecessor in interest, to render electric service in the city of Elvins and in the village of Kimmswick, respectively, under franchises theretofore granted, we rule, as an administrative policy, that applicant be not required to obtain new certificates of convenience and necessity to render service in said city and in said village.

However, the above language should not be construed as any holding or ruling on the part of this Commission that a certificate of convenience and necessity once issued confers upon a utility the right to operate in a municipality without municipal franchise.

[2] On question (2): In view of the provisions of the Public Service Commission Law and particularly § 5193 Rev. Stats. Mo. 1929, we are of the opinion that the legislature intended and required that any franchises granted to a gas corporation, an electrical corporation or a water corporation after the enactment and effective date of said statute, should be submitted to this Commission for approval, and that, before exercising any right or privilege under any franchise thereafter granted, such corporations are required to obtain the permission and approval of this Commission.

A franchise, like any other long-term contract entered into by a public utility under its jurisdiction, is a matter which the Commission may very properly inquire into with a view to determining whether the performance thereof by the utility will be in the public interest.

In conformity with such views, the Commission is of the opinion, and as an administrative policy holds, that applicant was required to submit to the Commission copies of the new franchises for examination and approval, and to obtain from the Commission permission and approval to exercise the rights and privileges and to assume the obligations arising under such new franchises.

Wherefore, it appearing from the record herein that a certified copy of Ordinance Number 243, enacted by said city of Elvins on October 4, 1937, and effective October 26, 1937, for a period of ten years, has been filed with this Commission; it further appearing that a certified copy of Ordinance No. 91, enacted by said village of Kimmswick, and effective for a period of twenty years from February 25, 1937, has been filed with this Commission; it further appearing that the rights and privileges granted applicant under said franchise ordinances and the obligations to be assumed by applicant thereunder are proper and not against the public interest; and it appearing to this Commission that said franchises should be approved and that applicant should be granted permission to exercise the rights and privileges granted thereby and should be permitted to assume the obligations arising thereunder, after due consideration, it is,

Ordered: 1. That the Union Electric Company of Missouri be, and it hereby is, granted permission to exer-

cise all lawful rights and privileges granted to it as a public utility under Ordinance No. 243 (enacted by the city of Elvins, Missouri, on October 4, 1937, and effective October 26, 1937) and to assume all lawful obligations arising thereunder, and the exercise of such rights and privileges by applicant is hereby approved.

Ordered: 2. That the Union Electric Company of Missouri be, and it hereby is, granted permission to exercise all lawful rights and privileges granted to it as a public utility under Ordinance No. 91 (enacted by the village of Kimmswick, Missouri, and effective for a period of twenty years from February 23, 1937) and to assume all lawful obligations arising thereunder, and the exercise of such rights and privileges by applicant is hereby approved.

Ordered: 3. That this order shall be effective on and after March 20, 1939, and that a certified copy of same shall be served upon applicant and all other interested parties, and that said parties shall within five days notify the Commission whether or not said order will be accepted and obeyed.

WISCONSIN SUPREME COURT

Wisconsin Public Service Corporation

v.

Public Service Commission

(— Wis. —, 284 N. W. 582.)

Franchises, § 62 — Surrender for indeterminate permit — Time limitations.

1. Neither a municipality nor a public utility could extend the time prescribed by a statute providing that a utility could obtain an indeterminate permit by surrendering its franchise on or before January 1, 1911, and by consenting that the municipality might acquire the utility's property without a jury establishing the necessity for the taking thereof, where the utility attempted to surrender its franchise on January 9, 1911, and where the consent expressed by the utility on that date was not a continuing consent because the advantages contemplated were not obtained, p. 302.

Franchises, § 62 — Indeterminate permit — Consent to acquisition of property.

2. A public utility which continued to operate after its franchise had expired did not, by so doing, voluntarily accept an indeterminate permit without the right to have a jury establish the necessity for municipal acquisition of its utility property, p. 302.

Franchises, § 62 — Indeterminate permits — Statutes.

3. The statute providing that every franchise granted prior to July 11, 1907, is an indeterminate permit constitutes an attempt to nullify and destroy the special franchises under which the existing utilities were then operating, as well as an attempt to confer upon those utilities the advantages

of indeterminate permits, thus relieving them of the necessity of applying for new permits when their franchises expired, p. 302.

Franchises, § 62 — Indeterminate permits — Acquisition of property.

4. A public utility which did not surrender its franchise for an indeterminate permit before January 1, 1911, was by virtue of statute vested with an indeterminate permit, with the right to demand a jury verdict in case the municipality should determine to acquire its property, since the statute so providing is valid, p. 303.

Franchises, § 11 — Power of legislature — Indeterminate permits.

5. The legislature has power to confer indeterminate permits in lieu of existing franchises upon such terms and conditions as it would, p. 303.

Franchises, § 61 — Indeterminate permits — Parties bound.

6. The state and municipality are bound by the terms of an indeterminate permit once it has been accepted and acted upon by a public utility, p. 303.

Municipal plants, § 26 — Acquisition of property — Determination by jury.

7. Acquisition proceedings cannot be commenced by a municipality to acquire property of a public utility without obtaining a jury verdict establishing the necessity for the taking where the utility company did not obtain an indeterminate permit without the right to jury trial under the Laws of 1907 and the Laws of 1909, but on the contrary received an indeterminate permit with the right of jury trial under Chap. 596, Laws of 1911, p. 303.

[March 7, 1939.]

APPEAL *from judgment of trial court setting aside orders of the Commission and holding that acquisition proceedings could not be commenced without obtaining jury verdict establishing the necessity for the taking; affirmed.*

Action begun May 26, 1936, by the Wisconsin Public Service Corporation against the Public Service Commission of Wisconsin, to vacate and set aside certain orders of the Commission made and entered in the course of proceedings for the acquisition of utility property by the city of Waupaca. The Commission's orders, dated September 5, 1935, and April 2, 1936, determined that the city of Waupaca had power to acquire the property of the plaintiff without a jury verdict establishing, the necessity for the taking. They also determined the terms upon which the city might obtain title to the utility property. From a judgment vacating and setting aside these orders on the grounds that a jury verdict, was necessary, the Commission appeals.

The Wisconsin Public Service Corporation owns and operates in the city of Waupaca an electric utility which was formerly operated by the Waupaca Electric Light Association, which held franchises granted by the city of Waupaca. These franchises consisted of an electric utility franchise granted October 2, 1894, for a term of twenty years, and a street railway franchise granted April 2, 1898, for a term of fifty years.

On December 12, 1910, the Wau-

paca Electric Light & Railway Company voted to surrender its franchise in order to obtain an indeterminate permit as provided in Chap. 499, Laws of 1907, and Chap. 180, Laws of 1909. Chapter 499, Laws of 1907, created the public utilities law and in §§ 1797m–77 and 1797m–78, provided that utilities operating under franchises might obtain indeterminate permits by surrendering their franchises and by consenting that the municipality in which they were located might acquire their property without a jury verdict establishing the necessity for the taking. Chapter 180, Laws of 1909, extended the time for consent and surrender to January 1, 1911. On December 28, 1910, the Waupaca Electric Light & Railway Company filed a surrender specifying only the street railway franchise. On January 9, 1911, the company filed an amended surrender notice, stating that it had intended to surrender the electric utility franchise. The city clerk attached to this instrument a note indicating that it was offered for filing after the expiration date.

On April 3, 1934, the city of Waupaca held a referendum election and by a majority vote determined to acquire the electric utility property. No action was commenced to obtain a jury verdict establishing the necessity for the taking. The Commission entertained proceedings to determine the terms upon which the city might acquire the property of the utility, and issued the orders mentioned above, expressing the opinion that a jury verdict was unnecessary because of the surrender filed by the Waupaca Electric Light & Railway Company as amended on January 9, 1911. The circuit court was of a contrary opinion and set aside the orders of the Commission.

APPEARANCES: John E. Martin, Attorney General, Harold H. Persons and H. T. Ferguson, Assistant Attorneys General, and Edward J. Hart, City Attorney, of Waupaca, for appellant; Miller, Mack & Fairchild and Bert Vandervelde, all of Milwaukee, for respondent.

FAIRCHILD, J.: The Constitution of this state, § 2, Art. 11, provides that no municipal corporation shall take private property for public use, against the consent of the owner, without the necessity thereof being first established by the verdict of a jury. In the present case no such verdict was found by a jury before the city of Waupaca commenced proceedings for the acquisition of electric utility property in that city, and the single issue upon this appeal is whether the utility corporation may be held to have so consented to the taking of its property as to make the jury verdict unnecessary.

When the utility law was first enacted by the legislature of 1907, many utilities were operating under municipal franchises. It was thought that regulation would be more effective if all utilities could be induced to operate under indeterminate permits of the kind created by that law. Uniformity would result and the utilities would benefit because they would be relieved of the necessity of appealing to local boards for extension of their franchises and for renewals when they expired. Accordingly, Chap. 499, Laws of 1907, created § 1797m–76 of the statutes, which provided that every li-

cense, permit, or franchise thereafter granted should have the effect of an indeterminate permit. Because of this provision, every license, permit, or franchise granted after the law of 1907 went into effect is to be regarded as an indeterminate permit, granted upon the condition that the utility consent to permit the municipality to acquire its property at a price to be fixed by the Commission.

The legislature evidently expected that existing utilities would exchange their franchises for indeterminate permits, because in §§ 1797m–77 and 1797m–78 created by the act of 1907 the legislature provided a procedure for the making of such exchanges and limited the time within which they could be made to July 1, 1908. By Chap. 180, Laws of 1909, the time for obtaining indeterminate permits by exchange was extended to January 1, 1911. But a condition of the surrender and exchange was consent to acquisition, and some of the utilities did not respond to the legislative invitation.

In July, 1911, the legislature enacted Chap. 596, Laws of 1911, with the evident purpose of completing the standardization of utility permits. La Crosse v. La Crosse Gas & E. Co. (1911) 145 Wis. 408, 421, 130 N. W. 530; South Shore Utility Co. v. Railroad Commission, 207 Wis. 95, 103, P.U.R.1932B, 465, 240 N. W. 784. As noted above, § 1797m–77, created by the act of 1907, provided for the voluntary surrender of franchises. Chapter 596, Laws of 1911, amended that section. As amended, it constitutes § 196.55 of the present statutes. Section 196.55 provides that every license, permit, or franchise granted prior to July 11, 1907, by the state or by a municipality, is so altered and amended as to constitute and be an indeterminate permit as defined in other sections of the law, except as provided by § 197.02, Stats. Section 197.02 provides that if a municipality shall determine to acquire a plant operated under an indeterminate permit as provided in § 196.55, such municipality shall bring an action in the circuit court against the utility for an adjudication as to the necessity of such taking by the municipality, and that unless the parties waive a jury, the question of necessity shall be submitted to a jury. It is evident that the legislature had in mind the requirement of § 2, Art. 11 of the Constitution when it made this provision for jury trial.

After enactment of Chap. 596, Laws of 1911, there were two kinds of indeterminate permits, and three ways in which a permit might have been obtained by a utility. The two kinds of indeterminate permits were (1) permits with waiver, or indeterminate permits without the right to demand a jury verdict, and (2) permits without waiver, or indeterminate permits conferred by Chap. 596 and carrying the right to demand a jury verdict. Permits without the right to demand a jury verdict were obtained either (1) by consenting to acquisition when applying for a new permit or franchise after the law of 1907 was enacted, or (2) by surrendering an existing franchise in accordance with Chap. 499, Laws of 1907, and Chap. 180, Laws of 1909. After January 1, 1911, the second way of obtaining an indeterminate permit with

waiver no longer existed, but as we have seen, Chap. 596, Laws of 1911, created a third way of obtaining a permit, namely, (3) by operation of law, existing utility franchises being converted into indeterminate permits with the right of jury trial on the issue of necessity. Wisconsin Power & Light Co. v. Public Service Commission (1935) 219 Wis. 104, 112, 10 P.U.R. (N.S.) 115, 261 N. W. 711, 262 N. W. 257; Pardeeville Electric Light Co. v. Public Service Commission (1935) 219 Wis. 482, 263 N. W. 366.

[1] It is contended by the Commission that when the city of Waupaca began proceedings to acquire the utility in 1934, it was operating under an indeterminate permit which it had obtained by method (1) or (2), and was therefore not entitled to demand a jury verdict. The utility contends that it was operating under a permit conferred as in (3).

The argument of the Commission is that the Waupaca utility gave expression to its consent to municipal acquisition by the surrender of December 28, 1910, together with the amendment of January 9, 1911. It is argued that since the intention to surrender was clearly manifested, that intention must govern. But it seems plain that nothing the officials of the utility could do after January 1, 1911, could place them in the position of having accepted advantages which the legislature had said were to be accepted, if at all, on or before January 1, 1911. Neither the city nor the utility could extend the time, and the consent expressed by the utility on January 9, 1911, since it did not obtain the advantages contemplated, cannot be held to be a continuing consent. This is particularly evident in view of the fact that Chap. 596, Laws of 1911, purported to confer upon the utility the very advantages it had hoped to secure by its attempted surrender, and to confer those advantages without requiring the utility to consent to acquisition without the taking of a jury verdict as to the necessity for the acquisition.

[2] It is also contended on behalf of the Commission that by continuing to operate after the expiration date of its franchise, October 2, 1914, the utility voluntarily accepted an indeterminate permit without the right of jury verdict. This argument bears little weight in view of the fact that the legislature, by Chap. 596, had conferred upon the utility an indeterminate permit whose validity the utility had no reason to question. It had the right to assume that the effect of Chap. 596 was to authorize it to continue to operate for an indefinite period.

[3] Chapter 596, Laws of 1911, was an attempt to accomplish two distinct things. It was an attempt to nullify and destroy the special charters or franchises under which the older utilities were then operating. It was also an attempt to confer upon those utilities the advantages of indeterminate permits, thus relieving them of the necessity of applying for new permits when their charters expired. In Superior Water, Light & P. Co. v. Superior (1923) 263 U. S. 125, 68 L. ed. 204, 44 S. Ct. 82, the Supreme Court of the United States held that Chap. 596 could not deprive a utility of contract or property rights. But that court did not say that Chap. 596 was wholly void, or that it was

not effective so far as it purported to grant indeterminate permits to utilities then operating under franchises granted prior to 1907.

[4] As counsel for the appellant concedes, the impression has long prevailed that Chap. 596 was effective in conferring indeterminate permits. In Wisconsin Power & Light Co. v. Public Service Commission, *supra,* the court said that by virtue of Chap. 596, Laws of 1911, the franchise there in question became an indeterminate permit. In Pardeeville Electric Light Co. v. Public Service Commission, *supra,* it was said that if the plaintiff utility was correct in its position that it had continued until 1911 to operate under a franchise granted in 1896, then that franchise became an indeterminate permit by the provisions of Chap. 596, Laws of 1911. We see no occasion for holding that Chap. 596, in so far as it conferred indeterminate permits, was void, as the appellant contends, and we feel constrained to hold that by virtue of that chapter the Waupaca utility was granted an indeterminate permit with the right to demand a jury verdict in case the municipality should determine to acquire its property.

[5–7] By continued operation after expiration of the electric utility franchise in 1914, the utility expressed its willingness to come within the provisions of the utility on the favorable terms offered in Chap. 596. There can be no question as to the right of the legislature to confer indeterminate permits upon such terms and conditions as it would. Having conferred upon the Waupaca utility an indeterminate permit with the right to demand a jury verdict, the state and municipality are bound by the terms of that permit once it has been accepted and acted upon as in the present case. Constitutional guaranties, both state and Federal, protected the utility against an invasion of its property and contract rights, and if such an invasion was intended by the legislature when it enacted Chap. 596, to that extent the chapter was invalid. But nothing in either Constitution prevented the utility from voluntarily accepting the offer of the legislature as it appeared on the statute books when the electric utility franchise expired.

The circuit court correctly concluded that acquisition proceedings could not be commenced without obtaining a jury verdict establishing the necessity for the taking.

Judgment affirmed.

WASHINGTON DEPARTMENT OF PUBLIC SERVICE

Re Dependable Delivery & Storage Company, Incorporated

[Order M. V. No. 30847, Hearing No. 1735.]

Motor carriers, § 2 — Scope of regulation — Transported vehicles.

1. A carrier engaged in the business of transferring motor vehicles under

their own power and by towing comes within the purview of a statute, the purpose of which is to regulate transportation where such transportation is performed by motor vehicles for compensation, since it makes no difference whether the vehicles are towed by other vehicles or whether they operate on their own power, p. 305.

Motor carriers, § 22 — License fees — Transported vehicles.

2. A carrier transporting motor vehicles under their own power and by towing should be required to secure as many identification plates and pay regulatory fees for as many vehicles as the carrier will be transporting at any particular time, p. 306.

[March 23, 1939.]

APPLICATION *for common carrier permit to transport vehicles; granted.*

By the DEPARTMENT: This matter came on regularly for hearing at Olympia, Washington, on the 4th day of November, 1938, pursuant to notice duly given, before Joseph Starin, examiner.

APPEARANCE: F. A. Pellegrini, Attorney, Seattle, for applicant.

Witnesses were sworn and examined, documentary evidence was introduced, and the Department, being fully advised, makes and enters the following

FINDINGS OF FACT AND OPINION

Dependable Delivery & Storage Company, Inc., made application for a common carrier permit under the provisions of Chap. 184, of the Laws of 1935, as amended by Chap. 166 of the Laws of 1937, and the rules and regulations of the Department of Public Service regulating motor freight carriers to authorize intrastate and interstate transportation of motor vehicles capable of being driven away under their own power, except road machinery and farm tractors, by the driveaway method in the state of Washington. A schedule of tariff rates and an insurance policy accompanied the application.

At the hearing the applicant requested that the application be amended to authorize the transportation of motor vehicles by towing in addition to transporting such vehicles under their own power. This amendment of application was allowed by the examiner.

This company has been engaged in the business of transferring motor vehicles under their own power and by towing for a period of two years. It will perform this service for all who may request, and also performs the service of unloading rail cars and delivering the motor vehicles to the dealer.

This is a quick and convenient method of transporting motor vehicles from place to place, and in some cases is the only method of transportation possible. It has certain advantages over rail shipments as shipment by rail requires that the motor vehicle be loaded on the rail car and unloaded at destination with consequent time lost. The applicant delivers these motor vehicles in single units under their own power and also by

means of a fifth wheel towing car where the front wheels of the towed vehicle are put up on the rear of the towing truck. Towing is also performed by means of a towing bar. Approximately 50 per cent of vehicles transported is in single units and 50 per cent by towing. The company does not transport wrecked vehicles. The vehicles transported are nearly all new vehicles or cars in good mechanical condition, and the company does not propose to transport wrecked vehicles.

Exhibit 3 is the report and order recommended by the examiner in the case of No. MC 88433, Dependable Delivery & Storage Company, Inc., common carrier application showing that the company by this order was granted authority to engage as a common carrier by motor vehicle in interstate or foreign commerce in the transportation of motor vehicles under their own power from Seattle, Washington, on the one hand to points located in the state of Washington, Oregon, Idaho, and Montana.

[1] This application was made to secure a determination from this Department as to whether the transportation contemplated by the applicant is governed by the provisions of Chap. 184 of the Laws of 1935, as amended by Chap. 166 of the Laws of 1937 of Washington. It is our opinion that applicant's proposed service is governed by said act and that the application should be granted.

Section 1 of Chap. 184 of the Laws of 1935, as amended by Chap. 166 of the Laws of 1937, sets forth the purposes of the act which provides that regulation is necessary due to the "rapid increase of motor carrier freight traffic," and in order to foster "sound, economic conditions in such *transportation* and among such carriers . . . in the public interest." It is apparent that the purpose of the act is the regulation of "transportation" where such transportation is performed by motor vehicles for compensation.

Section 2 (e) defines the term "common carrier" as "any person who undertakes to transport property for the general public by motor vehicle for compensation."

Section 2 (i) defines the term "motor carrier" as "common carrier," "contract carrier," "private carrier," and "exempt carrier."

Section 2 (c) defines the term "motor vehicle" as "any truck, trailer, semitrailer, tractor, *or any self-propelled or motor driven vehicle* used upon any public highway of this state for the purpose of transporting property. . . ."

Section 2 (k) defines the term "vehicle" as "every device capable of being moved upon a public highway . . . *by which any* person or *property* is, or may be, *transported* or *drawn* upon a public highway. . . ."

In this case the applicant is engaged in "transportation" of property, namely, "motor vehicles" for the general public either "drawn upon a public highway" or is engaged in transporting property, namely, "motor vehicles" for the general public by means of the *motor vehicle itself* for compensation. The operation therefore is within the provision of the act.

This is in accordance with the decisions of the Interstate Commerce Commission, motor carrier division, in a number of similar cases. (See John P. Fleming common carrier ap-

plication No. MC 48654, division 5, September 19, 1938, in which it was held that the driving of a car under its own power constitutes transportation within the meaning of the act.)

In 63 C. J. p. 799, the word "transporting" is defined as follows: "As commonly understood one is transporting an article when he is conveying it from one place to another. Transporting includes towing."

Also in Whitaker v. Hitt (1922) 285 Fed. 797, Hostetter v. United States (1926) 16 F. (2d) 921, and in Piper v. Bingaman (1935) 12 F. Supp. 755, it was held that driving of vehicles under their own power constitutes transportation.

In our opinion it makes no particular difference whether vehicles are towed by other vehicles or whether they operate on their own power. Both operations are within the purposes of Chap. 184 of the Laws of 1935, as amended, which is the regulation of transportation by motor vehicle for compensation.

[2] The question of fees which the applicant will pay requires some consideration. It is our opinion that the applicant should be required to secure as many identification plates and pay regulatory fees for as many vehicles as the applicant will be transporting at any particular time; for example, if the applicant is transporting seven motor vehicles at one time under their own power, he would be required to have plates attached to all these vehicles and upon delivery of the vehicles, the plates may be removed and attached to the next group of vehicles which are transported. For the transportation of passenger cars presumably weighing less than 5,001 pounds or other vehicles less than 5,001 pounds, the applicant would pay the regulatory fee for the class of motor vehicles less than this weight. For the transportation of trucks the applicant would pay the regulatory fee for the maximum gross weight of the truck transported under its own power where the applicant can determine the same previously, or the applicant may pay the regulatory fee based on the highest maximum gross weight which will be transported. Where vehicles are being towed either by towing bar or by fifth wheel method, both the towing vehicle and the vehicle being towed will require plates.

The schedule of rates filed with the application is not a proper tariff and a proper tariff compiled in accordance with the Department's tariff rules must be filed before the permit is issued.

The insurance policy filed with the application does not conform with the Department's requirements and a proper insurance policy must be filed before the application is granted and permit issued.

Applicant is fit, willing, and able to perform the service proposed and to conform to provisions of the law and the rules and regulations of the Department, and the proposed service to the extent authorized will not be contrary to the declared policy of the act.

ORDER

Wherefore, it is *ordered* after full consideration of all the facts and circumstances based upon the foregoing findings and opinion herein that Application (P–8054) of Dependable Delivery & Storage Company, Inc., for permit to operate as a common

carrier, be and it is hereby granted, that the permit shall be issued to the applicant upon payment of proper fees and filing of proper insurance and proper tariff in accordance with the findings in this order to authorize, intrastate, irregular route, nonradial service as a carrier of motor vehicles, both by driveaway and by towing methods, in the state of Washington; interstate, irregular route, radial service as a carrier of motor vehicles between Seattle, Washington, and points in Oregon, Idaho, and Montana.

CALIFORNIA RAILROAD COMMISSION

Re Pacific Gas & Electric Company

[Decision No. 31907, Application No. 22527.]

Certificates of convenience and necessity, § 102 — Extension of electric facilities —Determining factors.

Any determination of the feasibility of a proposed rural electric extension should rest essentially on the cost to serve, but such extension may be authorized where public interest so requires, a competitive aspect is threatened, and a special rate area is to be established wherein higher than normal rates are to be charged.

[April 11, 1939.]

APPLICATION *for authority to exercise certain franchise rights, to construct, operate, and maintain extensions of electric distribution system, to establish a new rate area, and to charge special rates therein; granted.*

APPEARANCES: R. W. DuVal, for applicant; W. T. Belieu and E. A. Garland, for Rural Homes Electric Coöperative, Inc.

By the COMMISSION: In this application Pacific Gas and Electric Company requests the necessary authority to exercise certain franchise rights now held; to construct, operate, and maintain certain extensions to its electric distribution system in portions of Tehama, Glenn, and Colusa counties not now served; and to deviate from the requirements of this Commission's General Order No. 64–A (Rules for Overhead Line Construction) in constructing the aforesaid lines. It also seeks the approval of the Commission to establish a new rate area embracing the territory in which the aforesaid electric lines are to be located and operated, and to charge special rates therein.

Notice of hearing was given to all interested parties, including the district attorneys of the counties involved.

Public hearing on this application was held in the town of Elk Creek,

California, on March 9, 1939, at which place and time evidence was taken by examiner Wehe and the matter was submitted for decision.

The area in which this new extension is to be built comprises portions of Tehama, Glenn, and Colusa counties, lying to the west of applicant's existing electric distribution system in the Sacramento Valley. At the present time the cities of Corning, Orland, Willows, and intervening rural areas are the nearest sections being served. Within the aforesaid unserved area are situated the communities of Paskenta and Flournoy in Tehama county; Newville, Chrome, Elk Creek, and Fruto in Glenn county; Stonyford and Lodoga in Colusa county; and rural homes between and adjacent to these various communities. According to testimony of applicant's witness it is anticipated, from a canvass which has been made, that 266 customers would be served by the proposed project. The record further shows that 13 additional prospective customers are yet to be solicited and 4 more prospective customers may be furnished service by slight reroutings of the proposed lines. To serve this entire group of new customers will require the construction of approximately 132 miles of 12,000-volt lines located substantially in accordance with the description shown in Exhibit "B" appended to the application which is amplified by Exhibit No. 1 introduced in evidence at the hearing.

The evidence shows that the annual gross revenue reasonably to be expected from the operation of this project is in the amount of $16,900. The record further shows that such estimate is based upon an actual canvass of prospective customers and is predicated upon the application of the rates generally now in force in the unincorporated territory served by applicant, plus 33⅓ per cent.

Applicant's witness testified that the building of this project will result in an estimated capital expenditure of from $900 to $1,000 per mile. Such costs will not only include the necessary investment to construct a single phase 12,000-volt line, but likewise will provide for all necessary transformers, service drops, and meters, as well as the survey costs of laying out the project and the securing of the necessary rights of way.[1]

The record shows that applicant company could not build the project with its own organization for costs within the estimates heretofore given; nevertheless, testimony was adduced showing that such costs could and would be realized by contracting the project to a reliable and qualified electrical contractor; that such contractor, using the standards as set forth in this Commission's General Order No. 64–A (Rules for Overhead Line Construction) and as modified by Rural Line Deviations, contained in Exhibit "C" of the application, would guarantee, under suitable bond, to deliver complete to applicant the physical electric lines and their appurtenances at a price not to exceed the maximum figure of $1,000 per mile.

It is the Commission's opinion that the performance of any contract that may be executed for the purpose herein discussed should be secured by a

[1] It was contemplated that all rights of way would be donated and that the costs involved would be limited to the expenses incidental to the signing up and transfer of title.

suitable bond that the work will be performed as specified and at the cost agreed to.

The evidence shows clearly that this proposed electric extension is being made in "lean" territory. The area which is proposed to be served is not newly developed, but has long been settled. It is given over, essentially, to stock raising and farming, and much of it might be classed as marginal lands. Because of the character of farming, homes are widely scattered. The survey shows that for the project as a whole, including the small towns and communities, the average number of customers to be served per mile of line is much less than normally considered necessary.

This means that the investment required in electric line facilities per customer is relatively high. To compensate for this higher investment cost, customer usage of electricity and/or rates should be correspondingly higher. The record shows that the relationship between investment and annual revenue is high in this project, even after giving full weight to the proposed increase of 33⅓ per cent in the rates to be charged, and after realizing the low construction cost. Such a relationship, the record shows, as between investment and the annual revenue will be a ratio of between 7 or 8 to 1. This corresponds with the established general practice of applicant of making line extensions free up to a ratio of 5 to 1. Where the ratio exceeds this last-named figure of 5 to 1, it is the practice for applicant to require prospective customers to advance the amount by which the actual investment exceeds the amount computed on this 5 to 1 basis.

While it is not a clearly established fact that, in making line extensions, the company cannot increase the ratio of investment to annual revenue beyond 5 to 1, and justify the same on cost of service, yet deviations from a uniform practice at least raise the question of discrimination and whether a precedent is being established when a more liberal extension policy is used.

There is another aspect to this proposed project, which has a direct bearing upon the requests made in this application. The record unquestionably justifies the conclusions that if it had not been for the competitive threat of the Rural Homes Electric Coöperative, Inc.,[2] the applicant would have requested permission to build a much lesser extension. This is substantiated by the fact that applicant did in September, 1938, informally ask permission to construct a portion of the present project, which would have been but 38.8 miles in length, as compared to the 132 miles here under application. It is probable that such a project could have been constructed within the usual revenue-investment relationship and at no increase in rates.[3]

While the Commission is of the opinion that any determination of the feasibility of a proposed extension should rest essentially on the cost to

[2] A coöperative enterprise made up of prospective users of service and presumably ready to proceed with development and operation in accordance with provisions of the Rural Electrification Act of 1936.

[3] The Commission in reply, by letter dated October 26, 1938, questioned the justification of applicant making a limited extension which would interfere with the development of a larger project by the people themselves, and which latter project would serve substantially the entire area.

serve, yet there are other factors that should not be overlooked. This proposed extension is not the usual one where a general rule can be applied with resulting fairness to all. This project represents an extension of considerable magnitude and one in which there is a large public interest, calling for service in an area which is not now enjoying electric utility service from any source. In addition to this there is also the competitive aspect which has heretofore been presented. It likewise differs in that the establishment of a special rate area is asked wherein higher than normal rates are to be charged. Because of this surcharge feature, the actual net revenue to be realized by applicant should be more favorable than is implied through the relationships heretofore presented in respect to investment and gross revenue.

It long has been the policy of this Commission to foster and encourage the development of rural line extensions. The Commission is of the opinion that the present project is warranted and in the interest of the general public and should be permitted with the minimum of restrictions.

The requests, that the applicant be permitted to establish a special rate area for the territory covered by this project and to surcharge existing rural rates for other rural service by 33⅓ per cent, appear fully justified under the circumstances and, in fact, we deem the surcharge necessary.

The period during which the surcharge will remain in effect is indeterminate at this time. Users of service may expect that when the investment-revenue ratio has been reduced to approximately 5 to 1, the surcharge will be entirely removed.

In sanctioning these requests, which the order will provide, the Commission does not, and cannot, bind itself as to future rate adjustments. The Commission is of the opinion that, because of the conditions present in the project, a preliminary or trial period of two years from date when service is hereafter first inaugurated should be permitted. Such a period will give time for wiring of homes, purchasing of appliances, and enable customers generally to accommodate themselves to the use of electric service. After such a period, if revenues have not come up to the representations made in the record, rate adjustments may prove necessary. The Commission likewise believes it necessary to be free to make adjustments on applicant's system operations and earnings for any deficiencies that may accrue from this project after the initial 2-year period as set forth above. Such adjustments might be deemed necessary in case the investment-revenue ratio did not at least equal 6 to 1.

The question likewise arises as to the basis on which additional extensions to the project here under consideration will be constructed. It is the opinion of the Commission that such additional extensions made during the first two years, dating from the beginning of the original project, should be constructed on the same investment-revenue basis as is shown by the original project, and that after such 2-year period, they be constructed in accordance with the then existing general extension policy, due consideration being given to any added

revenue occurring because of the rate surcharges.

The evidence shows that applicant has, for many years, supplied service and has constructed electric lines in Tehama and Glenn counties in accordance with franchise rights granted to its predecessors and under ordinances issued by those political subdivisions, prior to the effective date of the Public Utilities Act. Furthermore, applicant, according to the record, is furnishing electric service in Colusa county under franchise rights granted by that county in Ordinance No. 100, and by virtue of a certificate of public convenience and necessity issued by this Commission. Certification in the order will be made in accordance with these facts.

At the hearing a large number of persons were present but no one offered any protest to the granting of the application. In fact all those who expressed themselves, including representatives of the Rural Homes Electric Coöperative, joined hands with applicant in asking that the Commission authorize the extension in its entirety and as set forth in the application.

MISSOURI PUBLIC SERVICE COMMISSION

Central Mutual Telephone Company et al.

v.

O. B. Dorsey, Operating As Dorsey Telephone Company

[Case No. 9558.]

Service, § 462 — Telephones — Connection with mutually owned lines.

1. The state exercises no regulatory power over mutually owned telephone lines, and influence may be exerted over them concerning the service provided solely by the refusal on the part of a public utility to connect the party line to the switchboard until it has been put in such condition that the users of the utility service can secure satisfactory communication over that line; or if the owners of the mutual line refuse to pay the switching fee the utility has the privilege of disconnecting the line from the switchboard, p. 315.

Service, § 462 — Mutual telephone company — Switching service.

2. The owners of a mutually owned telephone line cannot secure switching service through the exchange of a public utility without paying something for that service, generally designated as switching service, p. 316.

Service, § 109 — Powers of Commission — Telephones — Mutual companies.

3. The Commission cannot require a privately owned public utility to ren-

der telephone service to a mutually owned telephone company unless the latter is willing to pay a lawful charge therefor, p. 317.

Rates, § 1 — Right to compensation.

4. The Commission must allow a privately owned telephone company to be properly compensated for the service furnished to all of its subscribers, p. 318.

Rates, § 571 — Telephones — Switching.

5. The Commission cannot refuse to authorize a privately owned telephone company to make a reasonable charge for all the switching service it renders, if it so chooses, or for any of the service it renders, so long as those subscribers who are charged for the service are not called upon to bear the burden of the service furnished to others without charge, p. 318.

[April 24, 1939.]

COMPLAINT *against charge made by telephone company for switching service; dismissed.*

By the COMMISSION: This case is before the Commission upon the complaint made by a number of individuals who, as an association, operate a telephone exchange under the name of the Central Mutual Telephone Company, and individuals who are users of the telephone service, and reside at the towns of Roads and Braymer, Missouri. Those residing at Roads formally complain against the charge of $15 per month made by the Dorsey Telephone Company for furnishing them telephone switching service. Those residing at Braymer complain because of their failure to get telephone service with parties at Roads. After due notice had been given a hearing was held in Jefferson City, at which time all interested parties were given an opportunity to appear and be heard. The case was thereupon submitted on the record.

The complainant, Central Mutual Telephone Company, herein referred to as the Roads Mutual, operates, as a nonprofit mutual association, a telephone exchange and system at Roads, Missouri, furnishing thereby exchange service to the residents located within the community known as Roads and the surrounding rural area. It is unincorporated and made up of a number of shareholders who as members of the association have advanced certain amounts of money each and become members of the association.

The defendant is a Missouri corporation whose address is Braymer, Missouri. The telephone system owned by the defendant is located in Braymer, and is used in furnishing telephone and switching service in that town and the surrounding rural territory. The two towns just mentioned are approximately 10 miles apart.

The evidence shows that on December 23, 1937, the Commission received a revised tariff sheet from the defendant carrying a charge, not heretofore in effect, of $15 per month. This charge of $15 per month was to be applied as a flat charge each month against the Roads Mutual for what the defendant claims is exchange and telephone service over the telephone sys-

tem of the defendant. The tariff itself shows that it became effective by operation of law on January 23, 1938. As a result of the application of this charge the complaint herein was brought to the Commission.

The evidence shows that the community of Roads is located in the northwest corner of Carroll county. The town of Braymer is located in the southeast corner of Caldwell county. The two counties join at the northwest corner of Carroll county and the southeast corner of Caldwell county, the border line of the two joining for some 5 or 10 miles. The northeast corner of Ray county joins the two counties near those two corners, the point of the northeast corner being approximately midway on a line between Roads and Braymer. The southwest corner of Livingston county also joins Carroll and Caldwell counties near that same community, so the four corners of the four counties are joined closely together, and the territory involved in this case is located in the area around the junction of those four counties.

Some 10 miles east of the town of Roads is the town of Bogard, served by a mutually owned telephone system and long-distance toll center for Roads. Six miles south of Roads is a town known as Lebanon, served by a mutually owned telephone system. The three towns are in Caldwell county. Some 6 miles west of Roads, in Ray county, is a community known as Regal, served by a mutually owned telephone system. As we mentioned above some 10 miles northwest of Roads in Caldwell county is the town of Braymer, then some 9 miles west of Braymer is the town of Cowgill, served by a telephone system owned by Mr. Pres. T. Cross and operated as a public utility. Twelve miles to the northwest of Braymer is the town of Breckenridge. Approximately 9 miles northeast of Braymer is the town of Ludlow, served by a mutually owned system, and 5 miles northeast is the town of Bawn, in Livingston county, in which is operated a privately owned telephone system.

It is claimed that Braymer, being a railroad town, is largely the trade center of the inhabitants within the town of Roads and rural areas surrounding that town. Telephone service has been secured largely over two telephone lines between Roads and Braymer, owned by a mutual association of individuals under the name of the Braymer-Roads Mutual Telephone Company. The parties owning these two lines are principally rural residents who have constructed the two lines and connected them to the switchboards at Roads and Braymer. Until the filing of the tariff providing for the $15 charge per month against the Roads Mutual, telephone service was furnished between the switchboards at Roads and Braymer without charge to the subscribers and without restriction, over lines not owned by either of them, but over the two lines mentioned above owned by the Braymer-Roads Mutual Telephone Company.

A part of the members of the Braymer-Roads Mutual secure their switching service through the Braymer exchange, and other members through the Roads exchange. The regular charge of 50 cents per month is charged those whose lines terminate at the Braymer board.

The complainant, Roads Mutual,

claims it is one of the oldest telephone companies in that area, its history dating back some thirty or thirty-five years. It claims to have had all that time switching service through the Braymer exchange and through the Braymer exchange to other exchanges in the towns we have mentioned. No charge was made for this telephone service, or for the switching service. This complainant takes the position that the $15 charge made against it is an unfair charge, that the local exchange rate charged for service at Braymer heretofore has compensated defendant for furnishing that service, and the tariffs were designed to cover all service furnished. To apply the new charge the Roads Mutual takes the view that the subscribers of the service at Braymer are denied privileges heretofore had and for which they had paid under the regular exchange rates. This complainant claims that service furnished through its exchange is of equal value to the defendant's system and subscribers, as the service it secures from the defendant.

Upon the application of the new rate of $15 per month the Roads Mutual applied a charge of 10 cents per call on calls received from Braymer, for the first 150 calls per month and no charge thereafter, thus balancing the flat charge of $15 per month made by the defendant. The defendant then notified the officers of the Central Mutual Telephone Company that it did not desire telephone service through the exchange at Roads, and refused to pay anything for calls that it might have occasion to send to or through the switchboard at Roads.

It is shown that toll service between Braymer and Roads can be secured over the toll circuits of the Southwestern Bell Telephone Company through a connection with the Bell System at Braymer, and through Bogard, over the mutually owned line between Bogard and Roads. That service is shown by the evidence to be unsatisfactory, both from the standpoint of quality of the service and the charge made therefor.

From the evidence it appears generally that there is a common community of interest throughout the area in which the towns we have named are located, the entire area being principally agricultural and interrelated in that way, the trade center being at Braymer because of its location on the railroad. Witnesses appeared who were subscribers of the service furnished by the complainant, as well as witnesses who were subscribers of the service furnished by the defendant at Braymer.

Some idea of the size of the exchange at Roads is shown by the fact that it renders service to 140 subscribers who secure exchange service through the switchboard located at Roads. Their system and its operation falls under the class of telephone exchanges commonly known as mutually owned and operated, not coming under the jurisdiction of the Commission.

The exchange at Braymer is owned by a private individual who operates it for hire and comes under the regulatory powers of this Commission. No complaint is made against the quality of the service furnished by the defendant. It furnishes full time service, except one hour at noon on Sunday.

The basis of the entire complaint

is the denial of service to Roads and the towns beyond upon the refusal to pay the $15 flat charge per month for switching and telephone service through the exchange at Braymer.

The issue brought before the Commission by the complainant for determination resolves itself into two questions: One question is, does the Commission have power to measure the service furnished by a mutually owned telephone system aginst the service furnished by a privately owned public utility, thereby saying they are equal or otherwise on a barter basis; or, should the Commission measure the service furnished by the public utility by determining whether or not the public utility is charging all parties served by it a proper rate, one that is not unduly discriminatory or preferential to the various users of the service furnished? The other question is: Does the Commission have the power to require a public utility to furnish service to a telephone exchange owned and operated by a mutual association, which is purely self-serving and not holding itself out to furnish telephone service to anyone but its members, the defendant not being a member, and possibly not falling within the category of an individual or group of telephone users who can take the service as a member of that association? The complaints of the other parties joining in this case will be determined when the two questions above presented are answered.

[1] To analyze the various relationships, it may first be stated that a privately owned telephone system operating as a public utility under the regulatory powers of this Commission, is a utility that has secured authority from the local municipal authorities and subsequently from the state to construct, maintain, and operate a telephone system within a prescribed area. Upon being granted such authority, it is required to file a schedule of rates it is to charge for the service offered. For furnishing the service to some of those users, the utility provides all the equipment, including the lines and telephone instruments within the users' respective premises. Beyond a certain area, generally known as the initial rate area, there are persons who secure service generally over lines known as party lines. All of these lines and instruments may be furnished by the public utility at a certain rate. Other users of the service associate themselves together as a mutual association, build a line through the area in which they live, bring the line to the exchange area where they secure switching service on to other like lines, or as users of the service furnished by the utility to its subscribers in the exchange area. These mutual lines pay for the switching service upon the basis of the number of telephones connected to the respective party line. No regulatory power is exercised by the state over these party lines. The only manner in which any influence may be exerted over them concerning the service provided is the refusal on the part of the utility to connect the party line to the switchboard until it has been put in such condition that the users of the utility service can secure satisfactory communication over that line; or, if the owners of the mutual line refuse to pay the switching fee the utility has the privilege of disconnecting the line from the switchboard.

[2] The owners of the mutually owned line cannot secure switching service through the exchange of the public utility without paying something for that service, generally designated as switching service.

The number of subscribers connected to that mutually owned party line may grow to the extent that they themselves may determine it more satisfactory to install a telephone switchboard, thereby breaking up the party line into any number of party lines, with the number of subscribers to each line limited. Then if a subscriber connected to one line desires to communicate with a subscriber on another line the switchboard will make the necessary connection. The association, however, has not changed in so far as the regulatory powers of this state are concerned, from what it was when all were connected to one party line. They continue to be a mutually owned association, operating under their own agreements and by-laws. The Central Mutual at Roads is of that character. It happens to serve the community known as Roads, and the number of subscribers was considered by them great enough to justify the installation of a switchboard and operating the system as an exchange. In the past they have received reciprocal switching service between their exchange and that at Braymer without any application of a charge either way. The owner of the exchange at Braymer has determined that a charge should be made for switching and telephone service furnished to the Roads Mutual and accordingly filed the charge of $15 per month. The tariff remained with the Commission the statutory period. It became effective by action of the law. No complaint was made against that charge during the thirty days it was on file before the effective date. Notice was given of the filing of the rate.

The rates charged by the defendant for switching service furnished to mutually owned rural party lines connected with its exchange is $6 per year per rural customer. On that basis, 50 cents per month, the complainant would be required to pay the defendant the charge of some $70 per month. However, through the installation of the switchboard at Roads, a very large percentage of the calls made by the subscribers of the Roads Mutual service are never taken into the switchboard at Braymer, complainant furnishing its own switchboard operators, thereby reducing the cost of operators at Braymer and the necessary amount of switchboard capacity to switch the service should all the calls for switching service of the complainant be brought into the Braymer exchange. So the cost of furnishing switching service through the complainant's mutual system, on the per subscriber basis, is nothing like as great as it is for other mutually owned lines where the line connects directly to the switchboard at Braymer. A charge of 50 cents per month per subscriber to the Roads Mutual would be a prohibitive and excessive charge.

On the other hand, the defendant claims that it is necessary to provide additional operating service for handling traffic coming from the Roads exchange that is not required if that service is not furnished. The manager of the defendant's system states

that the $15 charge is based largely upon the cost of furnishing sufficient operators to handle the traffic. The traffic consists of that coming from Roads, as well as that coming from the town of Lebanon to the south, and Bogard to the east of Roads. There is no doubt that it puts additional expense to furnish the service upon the defendant, and with the position it takes that it does not care for the service furnished by the complainant, there is little ground upon which the Commission can base a finding that the service between the two are equal and should be traded for accordingly. Should both parties take the position that the charge should be made on the basis of the calls made between the two switchboards the parties then originating the calls or receiving them would pay for the service, and the cost of furnishing service would not be applied to the bills rendered all users of the exchange service. There is no evidence in the case indicating it is desired by either party that a toll charge per call shall be instituted, except the 10-cent charge for the first 150 calls by the complainant to offset the flat charge of $15. After that there is no charge made, which indicates that the complainant does not desire any toll charge except as an offset toll charge.

On the basis of the flat charge of $15 per month the switching service charge to be provided by the defendant to the various customers of the complainant will amount to slightly over 10 cents per month per subscriber, as compared to the charge of 50 cents per month charged by the defendant to its other subscribers, who provide their own equipment and are known as mutually owned and operated lines. They show that by the installation of the switchboard at Roads the subscribers are relieved of a charge of 40 cents per month for their telephone service, to which must be added, of course, the cost of the assessments made for meeting the cost of operating their own system.

We do not see that the ownership of the lines between the switchboards at Roads and Braymer changes the issues in this case in any way, with the exception that the owners of the lines between those two exchanges have heretofore been accustomed to secure exchange service through the Braymer exchange, and by the action of the defendant in denying service to the Central Mutual Telephone Company, also deny service to the subscribers of the Roads-Braymer Telephone Lines. The owners of these two lines, being a mutually organized group, fall within the same category legally as the owner of the exchange at Roads.

[3] In the case of State ex rel. Buffum Teleph. Co. v. Public Service Commission (1917) 272 Mo. 627, P.U.R. 1918C, 158, 199 S. W. 962, L.R.A.1918C, 820, the court defined in a large measure the relationship between privately owned telephone systems and mutually owned telephone systems. The mutually owned system in Auxvasse, Missouri, desired a connection with the privately owned system in the same city, known as the Buffum Telephone Company. The court states, at pp. 169, 170, of P.U.R. 1918C:

"Rightly reasoned, this well-marked line runs through them all, that to authorize supervision the

character of the utility must be of such a nature that the exercise of its powers will affect public rather than private rights. Any other classification would destroy the ruling purpose underlying the creation of the Public Service Commissions, and necessarily, sooner or later, run afoul of constitutional provisions, the violation of which would be inimical to individual liberty of action.

"The same facts adduced to show that the Auxvasse Company is not a public utility will sustain the conclusion that its connection with the Buffum Company is not such a matter of public necessity and convenience as to authorize the issuance of an order in regard thereto. . . .

"The contention is vaguely made by appellant that the individual members of this company have collectively the right to demand the connection here under consideration. This contention is evidently based upon the assumption that numbers alone will establish the claim of public necessity. This is not true. Their mere numbers give them no more rights in the premises than a single individual would have under like circumstances. If A should demand that his private phone be connected with the Buffum Company, we may look in vain for authority in reason or the law for the exercise of such power by the Commission as will effect a compliance with this request. Granted to A, the right must, as a necessary consequence, be conceded to every other individual owning a private telephone line. The result would be the improper invasion of the rights granted by law to the Buffum Company, or, in other words, the taking of its property without due process of law. A therefore is entitled to the same service as others, but not more, and he will only be heard to complain when such service is denied."

In view of that decision, the Commission holds it has no power to require the defendant to render any telephone service to the complainant, unless the complainants are willing to pay a lawful charge therefor. We have stated above that the members of the Roads Mutual can secure switching and telephone exchange service through the defendant's exchange at the rate of 10 cents per month, whereas other subscribers who furnish their own equipment are required to pay the monthly rate of 50 cents per telephone per month.

[4, 5] If the Commission has no power to measure the value of the service furnished by the Roads Mutual, it has no power to compare the value of that service with the value of the service furnished by the defendant, the value of which the Commission can fix and determine. Consequently it must allow the defendant to be properly compensated for the service furnished to all of its subscribers. We believe, therefore, that the Commission cannot refuse to authorize the defendant to make a reasonable charge for all the service it renders, if it so chooses; or for any of the service it furnishes, so long as those subscribers who are charged for the service are not called upon to bear the burden of the service furnished to others without charge.

In view of the evidence submitted, the Commission finds that the charge

of $15 per month as a flat charge for exchange service between the switchboards of the complainant and the defendant, furnished to the complainant, is not an unlawful charge, and that this case should be dismissed.

PENNSYLVANIA PUBLIC UTILITY COMMISSION

C. A. Hamill et al.

v.

Borough of Ligonier

[Complaint Docket No. 11125.]

Municipal plants, § 11 — Jurisdiction of Commission — Extraterritorial extensions.

The Commission has no jurisdiction to compel a borough operating a municipal waterworks to extend its line beyond borough limits in order to furnish service to outside customers.

Service, § 52 — Powers of Commission — Extensions — Effect of charter.

Statement that the Pennsylvania Commission cannot compel a water company to extend service beyond its charter territory, p. 320.

Municipal plants, § 11 — Jurisdiction of Commission — Extraterritorial rates and service.

Statement that the Pennsylvania Commission has jurisdiction over the rates and service of a municipal plant beyond municipal boundaries where the municipality has extended its service to outside customers, p. 320.

[April 25, 1939.]

COMPLAINT *against refusal of municipal plant to furnish water service beyond municipal limits; dismissed.*

By the COMMISSION: This matter is before us upon complaint against the borough of Ligonier for its refusal to extend its municipal water line in Market street in the borough, northwardly beyond the borough limits for a distance of approximately 1,000 feet in order to serve the residences of complainants.

It appears from the record that on November 8, 1935, complainants petitioned the council of the borough of Ligonier to make the above-described extension and, upon motion, the council determined that it should be made. At a later meeting of council, held December 14, 1935, the action of the preceding meeting was ratified and it was resolved that work should be commenced at once. On January 6,

1936, the council, upon motion, determined to postpone installing the said extension until April 1, 1936, but subsequently, on April 27, 1936, all resolutions and motions previously adopted, providing for the extension to complainants were rescinded and annulled. The council further, by resolution, declared a policy against extending water service beyond borough limits and has since remained unwilling to extend service to complainants. Prior to the time of this complaint, an extension of 150 feet, northwardly beyond the borough limits, was made to serve two residential consumers but no work has ever been done upon the extension sought by the complainants.

The sole statutory authority for the exercise of Commission jurisdiction over municipalities rendering utility service is contained in § 401 of the Public Utility Law which provides, inter alia:

"Any public utility service being furnished or rendered by a municipal corporation beyond its corporate limits shall be subject to regulation and control by the Commission as to service and extensions, with the same force and in like manner as if such service were rendered by a public utility."

To determine whether or not the Commission has jurisdiction to act in this case, it is necessary first to ascertain whether the Commission could compel a public utility to extend service in a comparable situation.

The Commission cannot compel a water company to extend service beyond its charter territory. The company can, however, so extend by complying with the Act of May 21, 1901, P. L. 270, § 1 (15 P. S. 1407), and with § 202 (b) of the Public Utility Law, and if it does so extend, the Commission regulates the rates and service of the extended facilities.

Likewise, the Commission cannot compel a borough to extend water service beyond its corporate limits. The borough can, however, so extend by complying with the Act of May 4, 1927, P. L. 519, Art. XXIV, § 2407 (53 P. S. 14588), and with § 202 (g) of the Public Utility Law. By analogy to the Commission's power over water companies which extend beyond their charter territory, we are of the opinion that Commission jurisdiction over boroughs serving outside their charter territory is confined to regulating the rates and service of the existing extensions, but that no power is conferred upon the Commission to compel any further extension.

In view of the foregoing, we conclude that we have no jurisdiction to compel the borough of Ligonier to serve complainants in the instant case and that the complaint must be dismissed.

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Industrial Progress

Selected information about manufacturers, new products, and new methods. Also news on personnel changes, recent and coming events.

Electrical Sales Show Improvement

SINCE the second quarter of 1938, sales and sales prospects in the electrical supply trade have shown substantial improvement, according to a recent announcement by Dun & Bradstreet, Inc. Although the advance slowed down between February and the early part of May of this year, recent weeks have witnessed a strong revival. Current reports indicate that about half the ground lost in the setback of 1938 has already been regained.

So far, consumer goods divisions have contributed most to the expansion in volume. Heavy electrical equipment, which is dependent primarily on spending by the utilities, has advanced more slowly, although these lines also are currently showing good increases over a year ago.

Transformer and power line business, which is dependent on the utilities for the bulk of its volume, has run well ahead of a year ago. The buying of large motors and generators was considered disappointing during the first two months of the year, but an upturn in March raised the NEMA index of orders 47 per cent in one month. On the average, year-to-year gains in the heavy goods division for the whole first quarter are estimated at aproximately 25 per cent.

A moderate amount of extra construction in line with national defense needs is being projected and, if carried out, will favorably affect the demand for generating and transmission equipment.

Newport Co. Appoints Fletcher

THE Newport News Shipbuilding and Dry Dock Company announces the appointment of Mr. Robert I. Fletcher as acting comptroller, with office at the plant, Newport News, Virginia.

Immediately prior to his recent appointment, Mr. Fletcher was managing accountant with R. G. Rankin and Company, New York.

Chrysler Enlarges Plant

AN extensive program of modernization and improvement of its Los Angeles plant is being undertaken by Chrysler Motors. The project, according to a recent announcement by the company, will employ several hundred men on new construction as well as extensive alterations within the plant.

Approximately seventeen acres will be added to the present property, bringing the total to forty-four acres of factory ground. New extensions of present buildings will amount to 76,000 square feet, making the total area of plant buildings approximately 400,000 sq. ft.

New Underwriters' Standards for Connectors and Switches

UNDERWRITERS' Laboratories, Inc., have just issued a new standard for Pressure Wire Connectors and a revised edition of the Standard for Knife Switches, according to the American Standards Association.

Wire connectors submitted to the Laboratories for listing as approved after May 30th are judged under the new standard, except that manufacturers have the privilege of resubmitting under the previous requirements and obtaining listing on that basis until May 1, 1940, according to the Laboratories' announcement.

The new edition of the Standard for Knife Switches supersedes the edition of November, 1917, and becomes effective immediately.

EHFA Finances Gas Appliances

THE Electric Home and Farm Authority is now prepared to finance the sale of domestic gas appliances on a plan that is identical, in so far as practical, with the electric appliance plan, according to the A. G. A. E. M. Bulletin.

The gas appliances that are eligible for financing under this plan are: gas ranges, gas refrigerators, gas water heaters, gas furnaces and conversion burners.

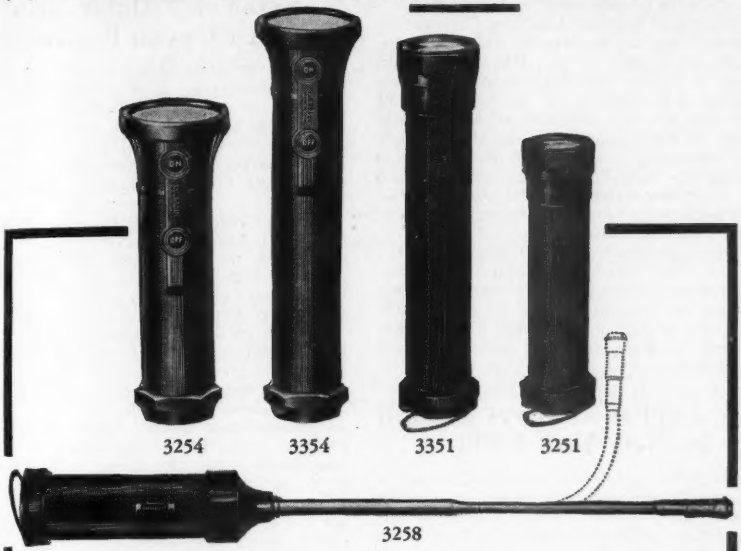
The terms on which gas appliances will be financed are similar to the terms of the corresponding types of electrical appliances, which are as follows:

1. The finance charge is 5 per cent per year on the original unpaid balance.
2. The minimum down payment is 5 per cent of the retail installed price.
3. Individual appliances may be financed over a maximum period of 36 months.
4. Combinations of two or more appliances on the same contract may be financed over a maximum period of 48 months.
5. The minimum monthly payment is $1.50.
6. The minimum amount eligible for financing is $40.00.

This financing plan is now available to utilities distributing gas only, as well as to utilities distributing gas and electricity.

Monthly installments are to be billed and collected by the utilities on the same dates

Which one do You want?



LOOK OVER THIS GROUP of fine new "Eveready" on-the-job flashlights, specially designed to meet the special needs of oil men and electricians.

The new WATERPROOF Flashlights, 3354 and 3254, are *completely covered*, switch-and-all, with a soft rubber sleeve. Unbreakable lenses, chrome plated reflectors. Proof against hot wires, acids, gasoline, oil, alcohol, greases and dirt.

The two and three cell general purpose Industrial Flashlights, 3251 and 3351, have unbreakable lenses, hand-replaceable switches are cased in semi-hard rubber. Safe with "hot stuff." Unaffected by water, oil, gasoline, alcohol, acids or dropping impact. No. 3258, the new Flexible Extension Flashlight, answers the demand for a safe light for inspecting moving machinery, railway journal boxes, drums, barrels, sounding pipes.

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that service bills are rendered and collected. A fee of $1.00 is paid to utilities for booking each contract and an additional 12½c per month for billing and collecting installments.

IBM Exhibit at Fair

SYMBOLICAL of the world-wide scope of International Business Machines Corporation, a large transparent glass World Globe, revolves in the center of the IBM exhibit auditorium in the Business Systems and Insurance Building at the New York World's Fair 1939.

Serving as the focal display in the IBM Gallery of Science and Art, the World Globe is a connecting link between the exhibition of paintings done by a leading artist in each of seventy-nine countries and the exhibition of IBM machines in which artistic styling is combined with engineering skill.

A map of the world is engraved on the surface of the globe and the seventy-nine countries in which International Business Machines are used are designated by silver stars. Inside the globe is an International Electric Accounting Machine, specially finished in gold and bronze.

New Appliance Drives Planned by New York Utility

TWO sales promotion campaigns, one on electric irons and the other on electric roasters, will be run during August by the Consolidated Edison Company of New York. A feature of the iron campaign will be a $1 trade-in on old irons. During the campaign month electric roasters will sell for $5 off the regular list price. Consolidated's approved dealers will take part in the campaigns, which will be run under its coöperative merchandising plan.

New G-E Portable Floodlight

A 250-WATT enclosed portable floodlight, for temporary or emergency illumination, has been announced by the General Electric Company. Easily handled with its weight of only 20 pounds, the new light is equipped with a galvanized steel trunnion bracket with a 12-inch circular base, 10 feet of rubber-jacketed cord with plug, and a carrying handle. A polished Alzak-processed aluminum reflector is inserted in a cast aluminum housing with the glass door available in plain, lightly stippled, heavily stippled and spreadlight types.

5000-Volt "Magne-Blast" Air Circuit Breaker

AN air circuit breaker for 5000-volt service, combining the basic principles of magnetic action and thermal reaction, was described by E. W. Boehne and L. J. Linde, engineers of the General Electric Company, in a paper presented at the combined summer and Pacific Coast AIEE convention in San Francisco.

Named "Magne-blast," the new breaker is intended for general applications in switching, controlling, and protecting 2300 to 5000 volt circuits. Tests which have been made on the breaker have shown it to possess the best advantages of both the air and oil type breakers.

The Magne-blast breaker offers a solution to the problems of size, flame, and disturbance inherent in previous air circuit breakers while retaining every advantage, according to Messrs. Boehne and Linde.

An important design feature of the new breaker is an interleaving chute formed by long, tapered fins alternating from either arc chute wall and extending from the throat and arc runner to the mouth of the arc chute. The arc is cooled and lengthened in the interleaving chute, adding resistance to the circuit as the arc is extinguished. Rates of rise of recovery voltage are held to a harmless value, they said.

Merchandising with Car Cards

THIRTY-EIGHT additional ways to make car cards work overtime for the advertiser as a perfect tie-in with transportation advertising campaigns are presented in an illustrated booklet issued recently by Barron G. Collier, Inc., 745 Fifth Ave., New York, N. Y., from whom copies can be obtained upon request.

Street Railways Advertising Company, has published a booklet—"Take One"—describing a new technique in transportation advertising which is cutting inquiry cost and creating extra selling opportunities. The "Take One" idea is described as the most direct link ever established between advertiser and prospect and completes the transition between transportation advertising as a reminder medium into advertising's greatest direct selling force.

Copies can be obtained upon request to the company, 745 Fifth Avenue, New York, N. Y.

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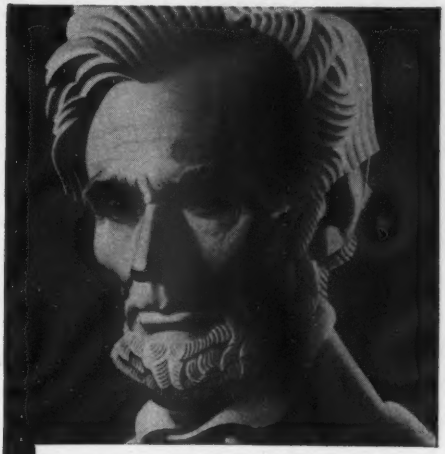

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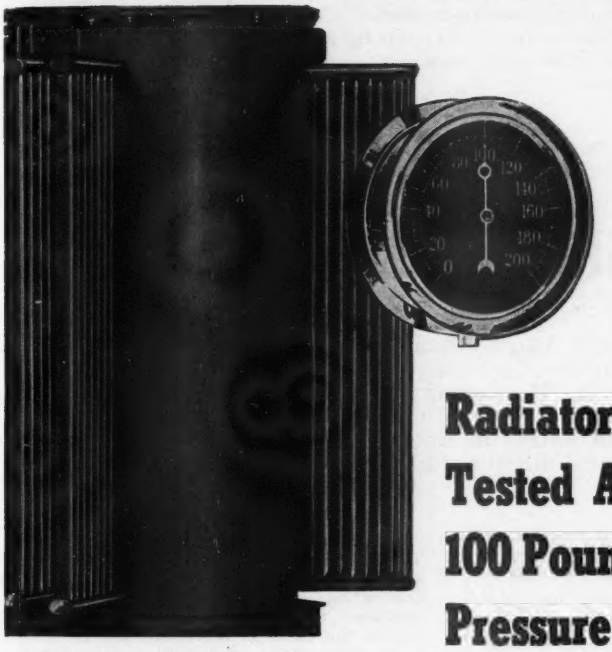

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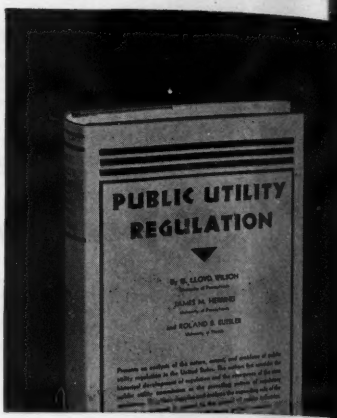

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Section of a Manchester positive plate showing buttons or rosettes of corrugated lead forced into openings in antimony grid.

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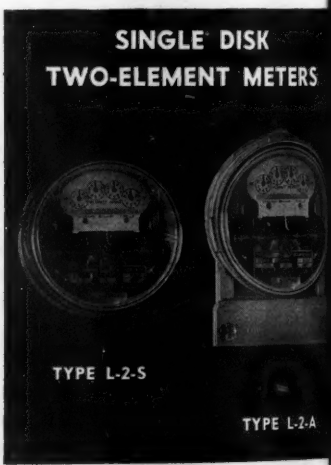

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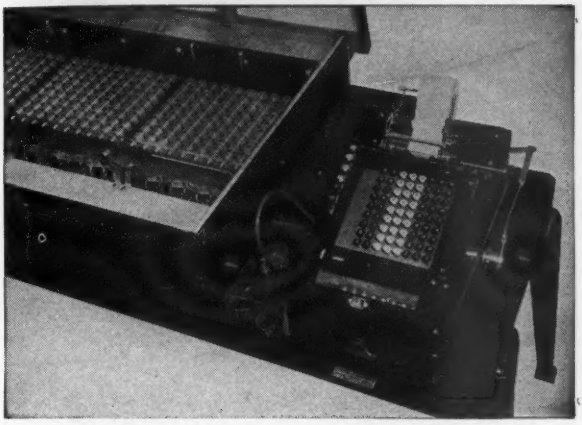

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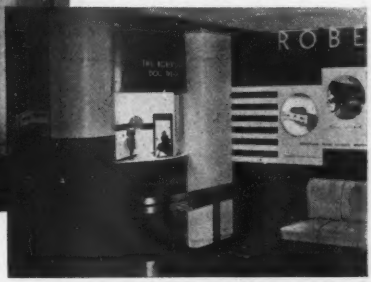

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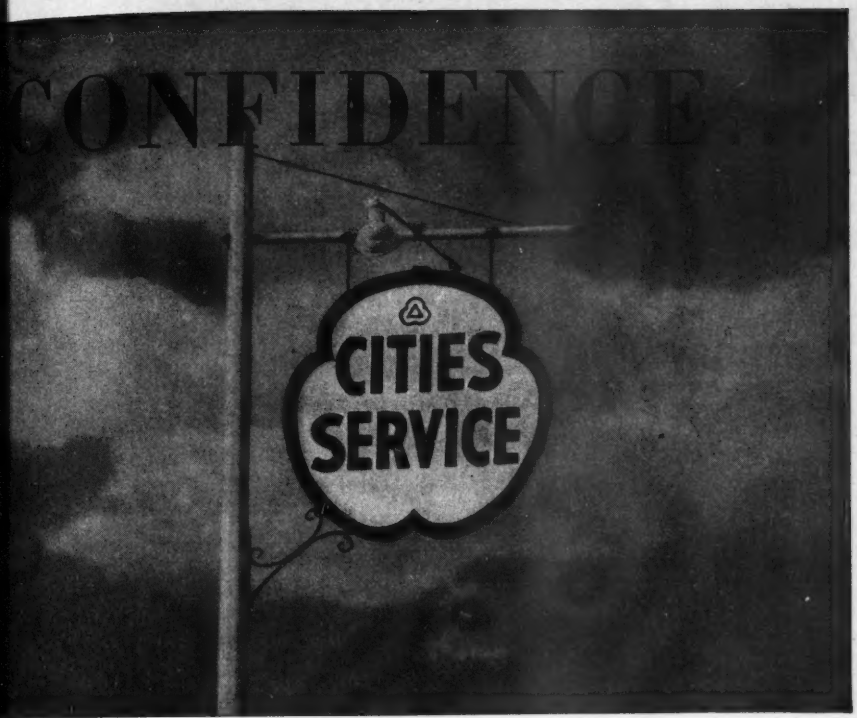

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